United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

77-7212
77-7223

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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
JUL 5 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

Docket No. 77-7212
Docket No. 77-7223

LEONARD DESSER, MELVIN DESSER and JACOB LANDESMAN,
Plaintiffs-Appellees-Appellants,

— against —

ROY A. ASHTON,
Defendant-Appellant-Appellee,

— and —

JAMES YOUNGBLOOD and TRANS-INDUSTRIES, INC.
Defendants-Appellees.

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES BELOW

DATE	PROCEEDINGS	Date Ord. Judgment
1 pr.28,69	Filed complaint and issued summons.	
2 [illegible]	Filed [illegible] motion to dismiss Complaint. Ret. 6/3/ 2.	
3 [illegible]	Filed [illegible] in support of motion.	
4 [illegible]	[illegible] to take [illegible] long.	
5 [illegible]	Filed [illegible] Memorandum of Law.	
6 un.6,69	Filed defts. Youngbloods notice of motion ~~ret. 6.17.69 for and~~ order dismissing the complaint.	
7 un.17-69	(Filed in court) deftn' reply memorandum.	
8 ec.31-69	Filed Memorandum Opinion #36432--Defts. move to dismiss the complaint. Accordingly the motion of the defts. to dismiss the complaint is granted subject to the pltffs' right within 20 days of the date hereof to file an amended complaint in accordance with the limitations expressed. above. It is so ordered--Lasker, J. m/n	
9 Jan.19-70	Filed stipulation and order extending plaintiff's time to file amended complaint to 3/2/70. So ordered. Bonsal, J.	
10 eb.5-70	Filed stipulation and order extending plaintiff's time to amend complaint to 2/15/70. So ordered. Cooper, J.	
11 eb.19-70	Filed stipulation and order extending plaintiff's time to file amended complaint to 2/26/70. So ordered. Mansfield, J.	
12 eb 21-70	Filed pltff's amended complaint	
13 ebr.-70	Filed stipulation and order extending plaintiff's time to file amended complaint to 2/2 /70. So ordered, McLean, J.	
14 Mar.6-70	Filed Notice of Motion re: Dismiss Complaint. Ret. 3/17/70.	
15 Mar.6-70	Filed Memorandum in support of motion.	
16 Mar.23-70	Filed stipulation adjourning motion now ret. 3/24/70 to 4/7/70.	
17 pr.7-70	Filed pltff's memorandum in opposition to deft's motion. (filed in court.)	
18 pr.15-70	Filed memorandum : The motion to dismiss is granted, with leave to the pltff's to submit a second amended complaint within twenty days of the date of the present determination. So ordered. Levet, J. m/n	
19 ay.5-70	Filed pltff's amended complaint.	
20 ay.28-70	Filed stip & order that time of deft's to answer with respect to pltff's second amended complaint is ext. from 5-15-70 to 5-29-70. So ordered. Motley, J.	
21 un.19-70	Filed deft's affidavit & notice of motion-dismiss complaint ret. 6-30-70.	
22 un.19-70	Filed deft's memorandum in support of his motion ret. 6-30-70.	
19 Mar.9-71	Filed Memo Endorsed on Amended Complaint filed 5-5-70--The within second amended complaint now states a cause of action under Section 10 (b) and Rule 10 (6) (5), 15 U.S.C. 78(i). See the prior opinions and orders of this Court: (1) The opinion of Judge Lasker of 12-3-62, and (2) The opinion of Judge Levet of 4-15-70. The motion to dismiss the second amended complaint is, therefore, denied. So Ordered: Motley, J. M/N	
23 Mar.23-71	Filed defts' notice to take deposition of certain pltffs' as indicated	
24 Mar.23-71	Filed defts' ANSWER to second amended complaint	SCC&C
25 Mar 21.73	Filed Stip& Order tha Messrs. Lane Feinberg & Cohen are substituted as attys. for pltffs in place & stead of Same Bacon & Bolan. So Ordered Pierce J.	
26 May 31.73	Filed Pltffs. Notice of Depositions to produce documents upon Dfts. R.A.Ashton & James Youngblood.	
27 Jun 6.73	Filed Report & Recommendation by Magistrate Goettel.	
28 Jun 6.73	Filed Dfts. Memorandum in opposition to motion for leave to amend complaint.	
29 Jun 6.73	Filed Memorandum of law in support of pltffs. motion for leave to file an amended complaint.	

continued

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JUDGE PIERCE

	DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
30	Jun 6-73	Filed Affidavit in opposition to motion for leave to file amended complaint. by Martin I. Shelton.	
31	Jun 7-73	Filed Pltffs. Notice of Motion. Re: Amended Complaint. ret. 4/30/73.	
32	Jun 7-73	Filed Memo. End. on Pltffs. motion dated 6/7/73. Motion grantedetc. Pltffs.must complete their discovery of the dfts. & appear for deposition prior to 6/29/73. Pierce J.	
32	Aug-30-73	Filed Memo. End. on motion dated 8/30/73, Motion is denied in all in respects. Pierce J.	
33	Aug-30-73	Filed Report & Recommendation by Magistrate Gottell.	
34	Aug-30-73	Filed Memorandum of law in support of defts. motion for an order staying depositions and fixing the time & place of deposition.	
35	Aug-30-73	Filed Affidavit by Malcolm I. Lewin in support of defts. Memorandum of law.	
36	Aug-30-73	Filed Pltffs. Memorandum of law in opposition to defts. protective order compelling depositions and the production of documents.	
37	Aug-30-73	Filed Memorandum of law in support of defts. motion for an order staying depositions and fixing the time & place of depositions.	
38	Nov 1-73	Filed Defts' ANSWER	SGC&K
39	Dec.14.73	Filed Pltffs. Notice to take deposition of Coenen & Co. on 1/4/74.	
	Nov-2-	PRE-TRIAL CONFERENCE HELD BY Magistrate Gottell	
	12-21-73	PRE-TRIAL CONFERENCE HELD BY Mag Gottell	
40	Jan 21.74	Filed Pltffs. Notice of Depositions & to produce documents of Duncan Miller on 1/30/74, Thomas Davidson on 1/30/74, First Nat'l City Bank on 1/30/74.	
	1/21/74	PRE-TRIAL CONFERENCE HELD BY Gottell	
	3-14-74	PRE-TRIAL CONFERENCE HELD BY Mag. Gottell	
	3/25/74	[illegible]	
	Apr 23-74	[illegible]	
41	May 16-74	Filed pre-trial order--Pierce. J. consented to.	
42	May 3-75	Filed defts' proposed findings and conclusions	
43	Sep 9-75	Filed defts Affidavit & Notice of Motion for an order dismissing the complaint, etc, as indicated, return before Pierce J. on 8-22-75.	
44	Sep 9-75	Filed defts memo of law in support of their motion for judgment dismissing the complaint.	
45	Sep 9-75	Filed pltffs memorandum of law in opposition to defts motion to dismiss complaint.	
46	Sep 9-75	Filed pltffs counter statement pars to Rule 9 (g).	

H. C. 110

(CONT'D)

JUDGE FILING

DATE	PROCEEDINGS
[illegible]-7-76	Filed pltff's Affidavit in opposition to motion to dismiss.
[illegible]-10-75	Filed ORD & Order that the parties trial memoranda will be filed with the Court on or before 9-19-75. Pierce, J.
11-3-75	Filed Order the defts motion for summary judgment is denied in all respects, Pierce, J. M/N - T. [illegible]
11-7-75	Filed OPINION # 43[illegible]. Accordingly, all outstanding dispositive motions of the defts are hereby denied. Pierce, J. M/N
11-10-75	Filed Order: The parties are directed to submit briefs to the Court by 5:00PM Thursday, 11-6-75 and appear in Court Friday, 11-7-75, etc, as indicated. Pierce, J. M/N
Nov 3-75	Trial begins before Pierce, J. and adj. to 11-7-75 (Non-Jury)
Nov 7-75	Trial continued
Nov 10-75	Trial cont'd
Nov 11-75	Trial cont'd
Nov 12-75	Trial cont'd and adj. to 11-19
Nov 19-75	Trial cont'd
Nov 20-75	Trial continued and concluded-Dec. Res.
Dec29-75	Filed Transcript of Record of Proceedings dated Nov 5, 10,11, 1975; Nov, 12,19,20, 1975
7-2-76	Filed Opinion #44708. The Court has jurisdiction over all claims & over all dfts. Pltffs. 1st cause of action against all dfts, dismissed as indicated. Pltffs. shall have judgment against dft. Ashton on 3rd cause of action as indicated. Pltffs. 4th cause dismissed as to dfts. Youngblood & Trans Industries dismissed as indicated. The issue of the amount of damages having been reserved, This matter will be set down for hearing on this issue, as indicated. Pierce J. (mailed notice)
7-21-76	Filed pltffs trial memorandum.
7-21-76	Filed defts pre trial memorandum.
7-21-76	Filed pltffs post trial memorandum.
7-21-76	Filed pltffs supplemental post trial memorandum.
7-21-76	Filed defts additional memorandum on federal jurisdiction.
7-21-76	Filed affidavit of Martin L. Shelton dtd 11-6-75.
7-21-76	Filed pltffs supplementary pre trial memorandum.
7-21-76	Filed defts post trial reply brief.
7-21-76	Filed defts post trial memorandum.
10-8-76	Filed defts Affidavit & Notice of Motion for an order permitting deft. Roy A. Ashton to appeal to the U.S.C.A.P. etc rtble on 10-18-76.
10-8-76	Filed defts memorandum in support of said motion.

D.C. 106a Continued from preceding page

DATE		PROCEEDINGS
(63	10-20-7[illegible]	Filed plfs's proposed findings of and conclusions as indicated.
64	10-21-76	Filed deft Ashton's trial memorandum on the issue of damages.
65	10-21-76	Filed defts Ashton's proposed findings of fact as indicated.
66	10-[illegible]	[illegible] proceedings dtd. 10-26-7[illegible].

CONTINUED ON PAGE 6

NARD DESSER, ET AL VS ROY A. ASHTON, ET AL / U... JUDGE PIERCE

DATE	PROCEEDINGS
67 10-26-76	Filed deft's Reply Affidavit in opposition to deft's motion for leave to take an interlocutory appeal purs to 28 U.S.C. 1292.
10-26-76	Non Jury Trial begun on issue of damages and adjourned to 12-6-76.
10-26-76	Filed memo endorsed on motion filed 10-8-76. The motion to certify is hereby denied Pierce, J. M/N.
68 1-5-77	Filed pltffs post trial memo on the issue of damages.
69 1-5-77	Filed deft. Ashton's post trial memo.
70 1-7-77	Filed transcript of record ... 12-7-76
71 3-8-77	Filed Memorandum & order for the foregoing reasons, judgment should be entered for the pltffs. against the deft. Roy A. Ashton, for dmages in the amount of $100,000 plus interest at the prevailing statutory rate from Sept. 26, 1967. Counsel for the Pltffs. is directed to submit an appropriate order of judgment on five days notice in accordance with the rulings of this Court in this decision and in the Opinion dated Jan. 29, 1976....So Ordered....PIERCE, J. m/n
72 [illegible]	[illegible] that this case is [illegible] ordered PIERCE, J. m/n
73 4-6-77	Filed judgment it is ordered that the first, second and fourth causes of action, contained in pltffs' third amended complaint are dismissed in their entirety on the merits, and that pltffs. Leonard Desser, Melvin Desser and Jacob S. Landesman recover of deft. Roy A. Ashton on the third cause of action contained in their amended complaint, the total sum of $166,875.00 and that pltff's complaint against defts. Younghloo and Trans Industries, Inc. be dismissed in its entirety on the merits, withurt costs to any of said parties from each other & that the execution of judgment stayed for thirty days pending appeal....PIERCE, J. Judgment Ent. 4-6-77...CLERK.
74 4-27-77	Filed Notice of appeal to the U.S.C.A. 2nd Circuit from the Judgment ent. on 4-6-77. Mailed copy.
75 5-4-77	Filed plaintiffs notice of cross-appeal from Final Judgment dated 4-6-77. mailed notice.
76 6-2-77	Pltff's memorandum in opposition to motion of Ashton
77 6-2-77	Affidavit of Kenneth L. Mackie in opposition of deft Ashton's motion for leave to appeal costs taxed
78 6-2-77	Pltff's memorandum in opposition to motion for leave to appeal
79 6-2-77	Pltff's official memorandum on issue of damages
80 6-2-77	Pltff's post trial reply memorandum on issue of damages
81 6-2-77	Deft's post-trial reply memorandum on issue of damages
82 6-3-77	Pltff's notice of settlement of judgment
83 6-3-77	Deft's memorandum on the issue of pre-judgment interest
84 6-6-77	Sullivan and Mathews letter

D. C. 109 Criminal Continuation Sheet

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FILED APR 28 1963 S.D. OF N.Y.

LEONARD DESSER, MELVIN DESSER and JACOB S. LANDESMAN,

Plaintiffs,

- against -

ROY A. ASHTON, JAMES YOUNGBLOOD and TRANS-INDUSTRIES, INC.,

Defendants.

COMPLAINT

Plaintiffs, through their attorneys, Saxe, Bacon and Bolan, allege as follows:

1. The causes of action in this complaint arise under Section 10(b) of the Securities Exchange Act of 1934 (hereinafter called the "SEC"), and this Court has jurisdiction by virtue of those sections of the Act and those Rules. This Court also has jurisdiction over the causes of action under its pendent jurisdiction.

2. The violations of the Act described in the complaint were carried out in whole or in part in the State and Southern District of New York.

3. The defendant used the United States mails and other instrumentalities of interstate commerce in perpetration of the violations of the Act hereinafter set forth.

4. Upon information and belief, defendant Trans-Industries, Inc. is a corporation duly organized and existing under and by the laws of the State of Delaware.

5. Plaintiff Leonard Desser is a citizen and resident of the State of Maryland.

6. Plaintiff Melvin Desser is a citizen and resident of

the State of Maryland.

7. Plaintiff Jacob A. Landesman is a citizen and resident of the State of New York.

8. Defendant James Youngblood is a citizen and resident of the State of Michigan.

9. Upon information and belief defendant Roy A. Ashton is a citizen and resident of the State of New York.

10. Transign Inc. is a corporation duly organized and existing under the laws of the State of Michigan.

11. British American Insurance Co. Ltd. is , upon information and belief, a corporation existing under the laws of the Nassau-Bahama Islands.

12. In 1966, British American Insurance Co. Ltd. was desirous of acquiring Transign Inc. a corporation whose principal was defendant Youngblood. In or about July, 1966, defendant Ashton, acting as a representative of British American Insurance Co. Ltd. agreed with plaintiffs that they were to receive thirty-five (35%) percent of the stock of a new corporation to be formed upon the acquisition of Transign Inc by a new corporation to be formed by the parties and transfer to it of Transign's property including valuable patent rights held by the said Transign. In contravention of the said agreement with plaintiffs, defendant Ashton and Youngblood caused defendant Trans-Industries to be formed and caused the assets of Transign Inc to be transferred to that corporation and caused Transign Inc to become a subsidiary of defendant Trans-Industries, a corporation controlled by defendants Ashton and Youngblood.

13. During the year 1966, defendants by the use of telephone and the mails, combined, committed acts which constituted

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1. a device, scheme and artifice to defraud the plaintiffs,

2. untrue statements of material facts and omissions to state material facts necessary in order to make the statements not misleading, which statements or omissions were made with knowledge or reasonable ground to believe that they were untrue or misleading, and

3. acts, practices and course of business all of which operated as a fraud on plaintiff in connection with the purchase or sale of a security, in violation of Section 10(b) of the Act and Rule 10b-5 of the S.E.C. More particularly, defendants omitted to disclose the interests of plaintiffs in defendant Trans Industries as hereinabove alleged.

AS AND FOR A FIRST CAUSE OF ACTION

14. Plaintiffs repeat, reiterate and reallege the facts set forth in paragraphs 1 through 13 of the complaint herein with the same force and effect as if set forth herein in full.

15. The facts set forth in paragraphs 1 through 14 of the complaint herein, were and are a violation of the Securities laws and rules hereinabove alleged in that the failure of the defendants to make full and adequate disclosure of plaintiffs' interests in defendant Trans Industries, Inc. constitute

1. a device, scheme or artifice to defraud;

2. an untrue statement of a material fact and an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading and

3. an act, practice or course of business which operated as a fraud or deceit upon the plaintiffs in connection with the purchase of plaintiffs' securities by the defendants.

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AS AND FOR A SECOND CUASE OF ACTION

16. Plaintiffs repeat, reiterate and reallege the facts set forth in paragraphs 1 through 13 of the complaint herein with the same force and effect as though set forth herein in full.

17. Plaintiffs accepted the obligations of defendants hereinabove alleged and have acted at all times in good faith.

18. Contrary to the terms of the agreement hereinabove alleged, and upon information and belief, in breach of the relationship and trust and confidence created thereunder between plaintiffs and defendants, said defendants committed the acts hereinabove alleged.

19. By reason of the foregoing, a constructive trust has been created over the thirty-five (35%) percent of the assets now or heretofore possessed by Trans Sign, Inc. and thirty-five (35%) percent of the stock of defendant Trans-Industries Inc.

20. Defendants have no adequate remedy at law.

AS AND FOR A THIRD CAUSE OF ACTION

21. Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs 1 through 13 of the complaint herein with the same force and effect as though set forth in full.

22. Upon information and belief, defendants Youngblood and Ashton did and still possess and exercise complete ownership and control over defendant Trans Industries, Inc.

23. By reason of the foregoing, defendants Roy A. Ashton [illegible]mes Youngblood and Trans Industries, Inc. are obligated [illegible] account to plaintiffs for theamounts presently due and owing [illegible]er the agreement hereinabove alleged.

24. Plaintiffs have no adequate remedy at law.

AS AND FOR A FOURTH CAUSE OF ACTION

25. Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs 1 through 13 of the complaint herein with the same force and effect as though set forth in full.

26. Upon information and belief, defendant Ashton is disposing of his stock in defendant Trans Industries, Inc. in order to avoid his obligations to plaintiffs, all to plaintiffs' irreparable harm, the said stock having a unique value to plaintiffs.

27. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand judgment with respect to the first cause of action

(a) awarding them damages in the sum of $500,000.00 ;

(b) awarding them punitive damages in the sum of $1,000,000.00;

(c) awarding plaintiffs the costs of this action and allowing reasonable attorneys fees to be paid by defendants;

(d) awarding plaintiffs such other and further relief as to the Court may seem just and proper.

With respect to the Second Cause of Action

(a) Declaring a constructive trust over defendants' equal to the benefits due plaintiffs under their agreement;

(b) awarding plaintiffs such other and further relief as to the Court may seem just and proper including the costs and disbursements of this action.

With respect to the Third Cause of Action

(a) an accounting for monies due and owing by defendants to plaintiffs under the agreement hereinabove alleged, together with the costs and disbursements of this action.

With respect to the Fourth Cause of Action

(a) Enjoining the defendant Ashton from disposing of his stock in defendant Trans-Industries, Inc., together with the costs and disbursements of this action.

SAXE, BACON & BOLAN

By _____
A partner
Attorneys for plaintiffs
39 East 68th Street
New York, N.Y. 10021
PL 2-6100

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO.

LEONARD DESSER, MELVIN DESSER and JACOB S. LANDESMAN,

Plaintiffs

v.

ROY A. ASHTON, JAMES YOUNGLOOD and TRANS-INDUSTRIES, INC.,

Defendants

SUMMONS

To the above named Defendant

You are hereby summoned and required to serve upon Saxe, Bacon & Bolan

plaintiff's attorneys, whose address 39 East 68th Street, New York, N.Y. 10021

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be

taken against you for the relief demanded in the complaint.

JOHN LIVINGSTON

Clerk of Court

Deputy Clerk

(Seal of Court)

Date: April 25, 1969.

Form USM-282
(Rev. 4-15-67)

RETURN ON SERVICE OF WRIT

United States of America

SOUTHERN DISTRICT OF NEW YORK

LEONARD DESSER, ET AL
vs.
ROY A. ASHTON, ET AL

Clerk's No. 69-CIV-1767

U.S. Marshal's No. 145-69

SERVICE COMPLETED ~~or~~ ENDEAVOR TO SERVE

I hereby certify and return that I ~~endeavored to serve~~ served the annexed SUMMONS & COMPLAINT (Writ)

on the therein-named ROY A. ASHTON (Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with (if ~~endeavor—describe what was done in endeavoring to serve~~) ROY A. ASHTON (Name of individual or agent of company, corporation, etc.)

personally at (if ~~endeavor—~~show addresses where endeavors made)

330 EAST 50TH STREET APT 1A (Address—Street number, apartment number, rural route, etc.)

NEW YORK (City) NEW YORK (State) in the said District

at ..... a.m.-p.m., on the 1st day of MAY, 1969.

SERVICE NOT COMPLETED

Date .....

I hereby certify and return, that on the ..... day of ....., 19....,

I received the within ..... and that after

diligent search, I am unable to find the within named .....

..... within said district.

Marshal's fees 3.00

Mileage 1.32 4.32

Charles R. Tyson
United States Marshal.

By ..... Deputy.

GPO 1967—O 280-803

Form No. USM 282
Edition 4-22-55

RETURN ON SERVICE OF WRIT

United States of America,

Eastern DISTRICT OF Michigan

For S/NY Civ 69-1767

ss:

Denzer
v
Trans-Industries, Inc et al

I hereby certify and return that I served the annexed Summons & Complaint (Writ)

on the therein-named Trans-Industries, Inc (Individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with Barbara Little, receptionist

(Individual or agent of company, corporation, etc.)

personally at 860 W Long Lake Rd (Address Street number, apartment number, rural route, etc.)

at Bloomfield Hills, Michigan (City) (State) in the said District

at a.m.—p.m., on the 5th day of May, 19 69

FEE FOR FORWARDING PROCESS OUT OF DISTRICT. . . .$1.00

Marshal's fees 3.00

Mileage 5.04

9.04

Orville L. Hoffer
United States Marshal.

By [illegible] Deputy.

U.S. GOVERNMENT PRINTING OFFICE 1964—O 756 107

Form No. USM 282
Edition 4-22-56

RETURN ON SERVICE OF WRIT

United States of America,
Eastern DISTRICT OF Michigan
For S/NY Civ 1767

ss:

Desser
v
Youngblood et al

I hereby certify and return that I served the annexed Summons & Complaint (Writ)

on the therein-named James Youngblood (Individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with Agatha Youngblood, wife (Individual or agent of company, corporation, etc.)

personally at 601 Orchard Ridge, their home & residence (Address Street number, apartment number, rural route, etc.)

at Bloomfield Hills (City) Michigan (State) in the said District

at ..... a.m.—p.m., on the 29th day of May, 1969

FEE FOR FORWARDING
PROCESS OUT OF DISTRICT. . . $1.00

Marshal's fees 3.00

Mileage 10.32 (incl Endorsd)

14.32

Orville L. Trotter
United States Marshal.

By [illegible]
Deputy.

U.S. GOVERNMENT PRINTING OFFICE 1964—O-756-107

#36432

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

LEONARD DESSER, MELVIN DESSER and JACOB S. LANDESMAN,

Plaintiffs,

-against-

ROY A. ASHTON, JAMES YOUNGBLOOD and TRANS-INDUSTRIES, ~~INC.,~~

Defendants.

- x

69 Civ. 1767

MEMORANDUM OPINION

APPEARANCES:

Saxe, Bacon & Bolan
39 East 68th Street
New York, N. Y. 10021
Attorneys for Plaintiffs

Shea, Gallop, Climenko & Gould
330 Madison Avenue
New York, N. Y. 10017
Attorneys for Defendants

LASKER, D. J.

Defendants move to dismiss the complaint under Rule 12(b), F.R.Civ.P., on the grounds that the court lacks jurisdiction of the subject matter of the action and that the complaint fails to state a claim upon which relief can be granted. The motion is granted with leave to file an amended complaint in accordance with the limitations set forth below.

Jurisdiction is sought to be predicated on allegations that the "causes of action [illegible] under Section 10(b) of the

Securities Exchange Act of 1934 ..." and that the court has "pendent jurisdiction."

The moving defendants contend that the complaint does not set forth a claim under the Securities Exchange Act of 1934; that, under the circumstances, no federal claim exists to confer jurisdiction on the court; and that accordingly the pendent claims should be dismissed.

The complaint, an exceedingly inartistic pleading, consists of introductory material and four separate "causes of action." There is difficulty in analyzing the import of the allegations, but they appear to set forth the following: that in or about July 1966 defendant Ashton agreed with plaintiffs that they were to receive 35% of the stock of a new corporation to be formed upon the acquisition of one Transign Inc. by a new corporation to be formed by the parties and transfer to it of Transign's property, including valuable patent rights held by the said Transign; that in contravention of the agreement with plaintiffs, defendants Ashton and Youngblood caused one Trans-Industries, Inc. to be formed and caused the assets of Transign to be transferred to Trans-Industries and caused Transign to become a subsidiary of Trans-Industries, which was controlled by Ashton and Youngblood. The complaint then parrots the language of Rule 10(b)-5, concluding with the claim that the "defendants omitted to disclose the interests of plaintiffs in defendant Trans-Industries as hereinabove alleged."

Each of the four separate causes of action repeats and realleges the claims of the introduction. The first cause of action, again parroting Rule 10b-5, alleges in conclusory language that the acts of the plaintiffs "are a violation of the Securities laws and rules hereinabove alleged." The second cause of action charges a breach of fiduciary relationship on the part of plaintiffs to defendants and asserts that a "constructive trust has been created over the thirty-five (35%) percent of the assets now or heretofore possessed by Trans Sign, Inc. and thirty-five (35%) percent of the stock of defendant Trans-Industries Inc." It concludes with the statement that the "defendants" [sic] have no adequate remedy at law. Plainly, this cause of action arises out of state law only. The third cause of action, also arising under state law, alleges that Ashton and Youngblood possessed and exercised complete ownership and control of Trans-Industries, Inc., and that accordingly defendants "are obligated to account to plaintiffs for the amounts presently due and owing under the agreement hereinabove alleged." It is claimed that plaintiffs have no adequate remedy at law.

The fourth "cause of action," which surely does not arise under federal law, is so incomplete as to raise a question as to whether it arises under any law. After repeating and realleging the contents of the introduction, it states merely:

> "Upon information and belief, defendant Ashton is disposing of his stock in defendant Trans Industries, Inc. in order to avoid his obligations to plaintiffs, all to plaintiffs' irreparable harm, the said stock having a unique value to plaintiffs."

Apparently by this language the plaintiffs intend to allege a cause of action for an injunction, as their prayer for relief indicates.

* * * * *

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), provides:

> "Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --
>
> * * *
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

S.E.C. Rule 10b-5, 17 C.F.R. § 240.106-5 (1964) provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security."

While it is true that recent cases of this Circuit (Heit v. Weitzen, 402 F.2d 909 (1968), cert. den. 395 U.S. 903 (1969), and SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (1968), cert. den. sub nomine Coates v. SEC and Kline v. SEC, 394 U.S. 976 (1969)) have broadened the construction of Section 10(b) and Rule 10b-5, there is no doubt that a plaintiff claiming a violation of Section 10(b) and Rule 10b-5 must set forth in his complaint the basic requirements of causality and reliance. As the Court of Appeals stated in Heit v. Weitzen, supra (at 913):

> "However, we must now reassess the holdings below in light of the principles enunciated in SEC v. Texas Gulf Sulphur Co., Docket No. 30882, 401 F.2d 833, at 839 (2d Circuit in banc 1968). Judge Waterman writing for the Court in Texas Gulf Sulphur construed the 'in connection with' requirement broadly and held that the clause was satisfied whenever a device was employed 'of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities.'" (Emphasis supplied.)

These views appear to have been strengthened in the most recent pronouncement of the Court of Appeals for this Circuit in Iriquois Industries, Inc. v. Syracuse China Corp., Slip Opinion No. 428, C.A. 2, Nov. 3, 1969.

Defendants contend that the complaint here does not contain the necessary allegations establishing that the defendants' acts were the cause of plaintiffs' damage, if any, nor that the plaintiffs relied on the alleged violative behavior of the defendants. It is the defendants' view that plaintiffs have merely alleged [illegible] of a claimed agreement

between the parties under which the plaintiffs were to have received 35% of the stock of a corporation "to be formed" and that, since the act supposed to have violated Rule 10b-5 occurred subsequent to the claimed agreement, there can be no causal relationship between the two events. However, as pointed out by Judge Mansfield in Commerce Reporting Company v. Puretec, Inc., 290 F.Supp. 715 (S.D.N.Y. 1968), at 718:

> "Although it has been suggested that an action under § 10(b) of the Exchange Act and SEC Rule 10b-5 may not be founded upon an aborted agreement to buy or sell securities, see Keers & Co. v. American Steel & Pump Corp., 234 F.Supp. 201 (S.D.N.Y. 1964), the law in this Circuit and elsewhere now appears to be established that it is unnecessary to prove a consummated, or closed, purchase or sale as condition to the institution of such a suit.
>
> * * *
>
> " ... The use of the words 'in connection with' indicates that Congress intended to protect against fraud in agreements to buy or sell, as well as with respect to completed sales, provided damages could be shown. Here, for instance, the plaintiffs allege in substance that but for the defendants' fraud, their purchase of the stock of Purer would have been consummated."

So, too, in the instant case, as well as it is possible to determine from the confusing averments of the complaint, it appears that the plaintiffs allege that but for defendants' fraud their acquisition of the stock which it was "agreed" they would receive would have been consummated. Nevertheless, even if the complaint be thus charitably construed,

it must be dismissed because it fails properly to plead the fraud without which, in this case, the plaintiffs' claim must fall. As was true in Commerce Reporting Company v. Puretec, Inc., supra (at 720), so here:

> "Unless the plaintiffs allege fraudulent intent on the part of the defendants at the time of the aforementioned agreements with defendants, that the plaintiffs entered into the agreements in reliance upon such fraudulent representations and suffered damages as a result thereof, the complaint would be insufficient as a matter of law."

Bearing in mind, however, the admonition of Rule 15(a), F.R.Civ.P., that leave to amend pleadings "shall be freely given when justice so requires," the plaintiffs shall have the right within 20 days of the filing of this memorandum, to file an amended complaint properly alleging fraudulent acts of the defendants, if any there be. However, it will not be sufficient for plaintiffs to amend their complaint by adding mere general and conclusory allegations of fraud. Rule 9(b), F.R.Civ.P., instructs that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." This requirement is construed (2A Moore's Federal Practice, ¶9.03, p.1925) to mean that "the pleader must [normally] state the time, place and content of the false misrepresentation, the fact misrepresented and what was obtained or given up as a consequence of the fraud."

The plaintiffs' request to amend their complaint by dropping Jacob S. Landesman as a plaintiff in order to establish

diversity jurisdiction is denied. The complaint alleges a single agreement "with plaintiffs" of whom Landesman was one. The plaintiffs, including Landesman, are clearly joint obligees, and each joint obligee is an indispensable party. As stated in 3A Moore's Federal Practice, ¶19.11, p. 2361:

> "Where two or more persons are the holders of distinct rights, each may sue without the presence of the others.
>
> "The rule is different where they are joint obligees. On the theory that the only promise that was made or duty created was single, joint obligees are indispensable parties in an action for the enforcement of the right."

And as stated in Bry-Man's Inc. v. Stute, 312 F.2d 585, 587 (5th Cir. 1963):

> "Obligors have a 'right to stand upon their contract and insist that they shall not be harassed with different actions or suits to recover parts of one single demand.'"

The 1966 revision of Rule 19 did not "change the basic principles concerning compulsory joinder which had evolved prior to and under original Rule 19." 3A Moore's Federal Practice, ¶19.01 [1], p. 2105.

Accordingly, the motion of the defendants to dismiss the complaint is granted subject to the plaintiffs' right within 20 days of the date hereof to file an amended complaint in accordance with the limitations expressed above. It is so ordered.

Dated: New York, N. Y.
December 31, 1969

Morris E. Lasker
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
FEB 24 1970
S. D. OF N. Y.

LEONRAD DESSER, MELVIN DESSER and JACOB S. LANDESMAN,

Plaintiffs,

-against-

ROY A. ASHTON, JAMES YOUNGBLOOD and TRANS-INDUSTRIES, INC.

Defendants.

69 Civ. 1767

AMENDED COMPLAINT

Plaintiffs, through their attorneys, Saxe, Bacon & Bolan, allege as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. The causes of action in this complaint arise under Section 10(b) of the Securities Exchange Act of 1934 (hereinafter called the "Act" as amended) 15 U.S.C. Sections 78(j) and Rule 10 b-5 of the Rules of the Securities and Exchange Commission (hereinafter called the "SEC"), and this Court has jurisdiction by virtue of those sections of the Act and those Rules. This Court also has jurisdiction over the causes of action under its pendent jurisdiction.

2. The violations of the Act described in the complaint were carried out in whole or in part in the State and Southern District of New York.

3. The defendant used the United States mails and other instrumentalities of interstate commerce in perpetration of the violations of the Act hereinafter set forth.

4. Upon information and belief, defendant Trans-Industries, Inc. is a corporation duly organized and existing under and by the laws of the State of Delaware.

5. Plaintiff Leonard Desser is a citizen and resident of the State of Maryland.

6. Plaintiff Melvin Desser is a citizen and resident of the State of Maryland.

7. Plaintiff Jacob A. Landesman is a citizen and resident of the State of New York.

8. Defendant James Youngblood is a citizen and resident of the State of Michigan.

9. Upon information and belief defendant Roy A. Ashton is a citizen and resident of the State of New York.

10. Transign, Inc. ("Transign") is a corporation duly organized and existing under the laws of the State of Michigan.

11. British American Insurance Co. Ltd. ("British American") is, upon information and belief, a corporation existing under the laws of the Nassau-Bahama Islands.

12. In or about April, May and June 1966, plaintiffs Leonard and Melvin Desser ("Messrs. Desser") were desirous of obtaining a substantial interest in and/or control of Transign -- a corporation whose principal was defendant Youngblood and a

corporation about which Messrs. Desser, through their own efforts, had obtained certain vital confidential information ("the confidential information") regarding its financial status.

13. In or about June, 1966, plaintiff Jacob S. Landesman arranged, through intermediaries, a meeting between Messrs. Desser and defendant Roy A. Ashton, the Vice-President of British American. At said meeting the plaintiffs informed defendant Ashton that they were in possession of confidential information regarding Transign and Ashton discussed with the plaintiffs the feasibility of having British-American finance the acquisition of Transign.

14. On or about June 20, 1966, a written agreement ("the June 20th agreement") was signed by the plaintiffs and by Ashton on behalf of British-American and himself. Said agreement provided, among other things, that, in order to induce the plaintiffs to make known to British-American and Ashton their confidential information about Transign, Ashton would not attempt to acquire Transign, or deal with it in any manner either personally or in any of his corporate capacities, except on terms and conditions agreeable to the plaintiffs in their sole discretion.

15. Pursuant to the June 20th agreement, plaintiffs furnished to Ashton the confidential information regarding Transign and it was thereupon agreed by and between the parties

that the plaintiffs were to receive 35% of the stock of a new corporation to be formed by the plaintiffs and by British-American, through Ashton, upon the acquisition of A) Transign, and B) of certain valuable rights and processes held by Transign.

16. In contravention of the agreements described in paragraphs "14" and "15" of this complaint, defendants Ashton and Youngblood caused defendant Trans-Industries, Inc. to be formed; caused the assets of Transign to be transferred to Trans Industries; and caused Transign to become a subsidiary of defendant Trans Industries, a corporation controlled by defendants Ashton and Youngblood. Plaintiffs did not receive their agreed upon 35% of the stock of Trans Industries, or any interest whatever in Trans Industries, Inc. and to date have received no compensation whatever from defendants Ashton, Youngblood and Trans-Industries, Inc.

17. At a time prior to the occurrences described in paragraph "16" of this complaint, defendant Youngblood obtained full knowledge of the agreements between Ashton and the plaintiffs described in paragraphs "14" and "15" of this complaint and by reason of his action detailed in paragraph "16" of this complaint, Youngblood ratified Ashton's fraudulent conduct described in paragraphs "12 through 20" of this complaint and is liable for the damages incurred therefrom by plaintiffs.

18. Trans Industries, Inc. was at its inception and upon information and belief still is controlled by defendants Ashton and Youngblood and is thereby liable for the damages incurred by plaintiffs as a result of said defendants' fraudulent conduct described in paragraphs "12" through "20" of this complaint.

19. To this date, defendants Ashton, Youngblood and Trans Industries, Inc. have refused to negotiate with plaintiffs concerning the amount owing to plaintiffs as a result of the damages incurred by plaintiffs as a result of defendants' fraudulent conduct described in paragraphs "12" through "20" of this complaint.

20. (A) The conduct of defendants described herein in paragraphs "12" through "20" was carried out by the use of telephone and the mails combined and consisted of acts which constituted:

1. a device, scheme or artifice to defraud;
2. untrue statements of material facts and ommissions to state material facts in order to make the statements not misleading, which statements were made with knowledge or reasonable ground to believe that they were untrue or misleading, and

3. acts, practices and course of business all of which operated as a fraud on plaintiffs in connection with the purchase or sale of a security, in violation of Section 10(b) of the Act and Rule 10 b-5 of the SEC.

(B) Defendants' conduct, described in paragraphs "12" through "20" of this complaint, constituted a willful and fraudulent scheme and ploy a) to induce the plaintiffs to furnish the defendants with plaintiffs' confidential information, which information defendants falsely represented they would not use to attempt to acquire Transign; b) to prevent the plaintiffs from proceeding with their intention to attempt to purchase a substantial and/or controlling interest in Transign; and c) to thereby enable Ashton and Youngblood to transfer the assets of Transign to a corporation in which the plaintiffs would have no interest -- Trans Industries, Inc. Specifically, the plaintiffs would have acquired their 35% of the stock of Trans Industries, Inc. if the defendants had not contravened their agreements with plaintiffs -- which agreements were an integral part of defendants' fraudulent scheme as described in paragraphs "12 through 20" of this complaint, and were entered into by plaintiffs solely because of plaintiffs' reliance upon defendants misrepresentations and misleading inducements.

AS AND FOR A SECOND CAUSE
OF ACTION

21. Plaintiffs repeat, reiterate and realledge the allegations contained in paragraphs "1 through 20" of the complaint herein with the same force and effect as though set forth in full.

22. Upon information and belief, defendant Ashton is disposing of his stock in defendant Trans Industries, Inc. in order to avoid his obligations to plaintiffs, all to plaintiff's unreparable harm.

23. Plaintiffs have no adequate remedy at law.

24. By reason of the foregoing, it is essential that an injunction be issued enjoining Ashton from disposing of his stock in Trans Industries, Inc.

WHEREFORE, plaintiffs demand judgment with respect to the First Cause of Action:

(A) Awarding them damages in the sum of $500,000.00.

(B) Awarding them punitive damages in the sum Of $1,000,000.00.

(C) Awarding plaintiffs the costs of this action and allowing reasonable attorneys fees to be paid by defendants.

(D) Awarding plaintiffs such other and further relief as to the Court may seem just and proper.

With repsect to the Second Cause of Action:

(A) Enjoining the defendant Ashton from disposing of his stock in defendant Grass Industries, Inc. together with the costs and disbursements of this action.

(B) Awarding such other and further relief as to the Court may seem just and proper.

DAHL, BECKER & BOLAN

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Y

Peter T. Kim,
One of Its Attorneys
Attorneys for Plaintiffs
39 East 68th Street
New York, New York

752-6100

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

LEONARD DESSER, MELVIN DESSER and
JACOB S. LANDESMAN,

Plaintiffs,

69 Civil 1767

-against-

MEMORANDUM

ROY A. ASHTON, JAMES YOUNGBLOOD
and TRANS-INDUSTRIES, INC.,

Defendants.

- -

U.S. DISTRICT COURT
APR 15 1970

LEVET, D. J.

Defendants move pursuant to Rule 12(b)(1)(6) for dismissal of plaintiffs' amended complaint on the grounds of lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted.

The amended complaint alleges causes of action for damages and injunctive relief, relying for a jurisdictional basis on Section 10(b) of the Securities Act of 1934 and "pendent jurisdiction."

On December 31, 1969, Judge Lasker of this court, in granting defendants' motion to dismiss the original complaint subject to plaintiffs' right to file an amended complaint, held that plaintiffs had failed to properly allege any fraudulent acts by the defendants. He also appeared to suggest that the alleged

written agreement signed by plaintiffs and defendant Ashton was sufficient foundation for a federal claim under Section 10(b).

The sufficiency of the amended complaint is challenged by defendants primarily because the complaint is said not to have properly alleged fraud, although defendants also seem to assert that fraud in connection with an agreement to purchase or sell securities, even if such fraud is pleaded adequately, is not within the purview of Section 10(b).

There is some authority for the proposition that a contractual agreement to purchase or sell securities which is not consummated by reason of defendants' fraud is actionable under Section 10(b). See Crane Company v. Westinghouse Air Brake Company, 419 F. 2d 787, 797-798 (2nd Cir. 1969) and cases cited at 798, n. 12.

In any event, the amended complaint, while an improvement over the original complaint from a pleading standpoint, still fails to allege fraud sufficiently to withstand a motion to dismiss.

Fraud may not be based on statements which are promissory in character unless at the time of making the promise the promisor had no intention of keeping the promise. Sutro Bros. & Co. v. Indemnity Insurance Co. of North America, 264 F. Supp. 273, 288 (S.D.N.Y.), aff'd 386 F. 2d 798 (2nd Cir. 1967). Moreover, it is

axiomatic that fraud consists of something more than the breach of a contract.

The amended complaint is replete with conclusory references to "fraudulent" conduct by defendants, not to mention considerable use of the terminology of Section 10(b) and SEC Rule 10b-5, 17 C.F.R. § 240.106-5.

What is lacking, however, is a proper allegation of fraud setting forth the elements of a cause of action for fraud, including intent on the part of the defendants at the time of the agreement.

The motion to dismiss is granted, with leave to the plaintiffs to submit a second amended complaint within twenty days of the date of the present determination.

So ordered.

Dated: New York, N.Y.
April 15, 1970.

Richard H. Levet
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
MAY 5 - 1970
S. D. OF N. Y.

----------X

LEONARD DESSER, MELVIN DESSER and
JACOB S. LANDESMAN,

Plaintiffs,

69 Civ. 1767

-against-

AMENDED COMPLAINT

ROY A. ASHTON, JAMES YOUNGBLOOD
and TRANS-INDUSTRIES, INC.,

Defendants.

MEMO ENDORSED

----------X

Plaintiffs, through their attorneys, Saxe, Bacon & Bolan, allege as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. The causes of action in this Complaint arise under Section 10(b) of the Securities Exchange Act of 1934 (hereinafter called the "Act" as amended) 15 U.S.C. Sections 78(j) and Rule 10 b-5 of the Rules of the Securities and Exchange Commission (hereinafter called the "SEC"), and this Court has jurisdiction by virtue of those sections of the Act and those Rules. This Court also has jurisdiction over the causes of action under its pendent jurisdiction.

2. The violations of the Act described in the Complaint were carried out in whole or in part in the State and Southern District of New York.

3. The defendant used the United States mails and other instrumentalities of interstate commerce in perpetration of the violations of the Act hereinafter set forth.

4. Upon information and belief, defendant Trans-Industries, Inc. is a corporation duly organized and existing under and by the laws of the State of Delaware.

5. Plaintiff Leonard Desser is a citizen and resident of the State of Maryland.

6. Plaintiff Melvin Desser is a citizen and resident of the State of Maryland.

7. Plaintiff Jacob A. Landesman is a citizen and resident of the State of New York.

8. Defendant James Youngblood is a citizen and resident of the State of New York.

10. Transign, Inc. ("Transign") is a corporation duly organized and existing under the laws of the State of Michigan.

11. British American Insurance Co. Ltd. ("British American") is, upon information and belief, a corporation existing under the laws of the Nassau-Bahama Islands.

12. In or about April, May and June 1966, plaintiffs Leonard and Melvin Desser ("Messrs. Desser") were desirous of obtaining a substantial interest in and/or control of Transign -- a corporation whose principal was defendant Youngblood and a corporation about which Messrs. Desser, through their own efforts had obtained certain vital and confidential information ("the confidential information") regarding its financial status.

13. In or about June, 1966, plaintiff Jacob S. Landesman arranged, through intermediaries, a meeting between Messrs. Desser and defendant Roy A. Ashton, the Vice-President of British American. At said meeting the plaintiffs informed defendant Ashton that they were in possession of confidential information regarding Transign and Ashton discussed with the plaintiffs the feasibility of having British-American finance the plaintiffs' acquisition of Transign.

14. In said agreement, Ashton, in order to induce the plaintiffs to make known to him their confidential information about Transign, wilfully misrepresented to the plaintiffs that he would not attempt to acquire Transign, or deal with it in any of his corporate capacities, except on terms and conditions agreeable to the plaintiffs in their sole discretion.

15. Subsequent to the June 20th agreement, Ashton wilfully and fraudulently misrepresented to the plaintiffs that the plaintiffs were to receive 35% of the stock of a new corporation to be formed by the plaintiffs and by British-American, through Ashton, upon the acquisition of A) Transign, and B) of certain valuable rights and processes held by Transign and as consideration for said wilful and fraudulent misrepresentation and in reliance thereon the plaintiffs furnished their confidential information to Ashton. In entering into this agreement, Ashton had no intention of providing plaintiffs with 35% of the stock of the corporation

to be formed, but merely made said representation to further his fraudulent scheme and ploy whereby:

a) he would obtain the plaintiffs' confidential information

b) he would prevent the plaintiffs from proceeding with their intention to attempt to purchase a substantial and/or controlling interest in Transign; and

c) he would be able to transfer the assets of Transign to a corporation in which the plaintiffs would have no interest - i.e. Trans Industries, Inc.

16. In contravention of the agreements described in paragraphs "14" and "15" of this Complaint, defendants Ashton and Youngblood caused defendant Trans-Industries, Inc. to be formed; caused the assets of Transign to be transferred to Trans Industries; and caused Transign to become a subsidiary of defendant Trans Industries, a corporation controlled by defendants Ashton and Youngblood. Plaintiffs did not receive their agreed upon 35% of the stock of Trans Industries, or any interest whatever in Trans Industries, Inc. and to date have received no compensation whatever from defendants Ashton, Youngblood and Trans-Industries, Inc.

17. At a time prior to the occurrences described in paragraph "16" of this Complaint, defendant Youngblood obtained full knowledge of the agreements between Ashton and the plaintiffs described in paragraphs "14" and "15" of this Complaint and by

reason of his action detailed in paragraph "16" of this Complaint, Youngblood ratified Ashton's fraudulent conduct described in paragraphs "12 through 20" of this Complaint and is liable for the damages incurred therefrom by plaintiffs.

18. Trans Industries, Inc. was at its inception and upon information and belief still is controlled by defendants Ashton and Youngblood and is thereby liable for the damages incurred by plaintiffs as a result of said defendants' fraudulent conduct described in paragraphs "12 through 20" of this Complaint.

19. To this date, defendants Ashton, Youngblood and Trans Industries, Inc. have refused to negotiate with plaintiffs concerning the amount owing to plaintiffs as a result of the damages incurred by plaintiffs as a result of defendants' fraudulent conduct described in paragraphs "12 through 20" of this Complaint.

20. The conduct of defendants described herein in paragraphs "12 through 20" was carried out by the use of telephone and the mails combined and consisted of acts which constituted:

1. a device, scheme or artifice to defraud;
2. untrue statements of material facts and ommissions to state material facts in order to make the statements not misleading, which statements were made with knowledge or reasonable ground to believe that they were untrue or misleading, and

3. acts, practices and course of business all of which operated as a fraud on plaintiffs in connection with the purchase or sale of a security, in violation of Section 10(b) of the Act and Rule 10b-5 of the SEC.

21. As a result of plaintiffs' reliance upon defendants fraudulent misrepresentations, as described aforesaid in paragraphs "12 through 20" of this Complaint, plaintiffs have suffered actual damages in the amount of $500,000.00.

AS AND FOR A SECOND CAUSE OF ACTION

22. Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "1 through 20" of the Complaint herein with the same force and effect as though set forth in full.

23. Upon information and belief, defendant Ashton is disposing of his stock in defendant Trans Industries, Inc. in order to avoid his obligations to plaintiffs, all to plaintiff's unreparable harm.

24. Plaintiffs have no adequate remedy at law.

25. By reason of the foregoing, it is essential that an injunction be issued enjoining Ashton from disposing of his stock in Trans Industries, Inc.

WHEREFORE, plaintiffs demand judgment with respect to the First Cause of Action:

(a) Awarding them damages in the sum of $500,000.00.

(b) Awarding them punitive damages in the sum of $1,000,000.00.

(c) Awarding plaintiffs the costs of this action and allowing reasonable attorneys fees to be paid by defendants.

(d) Awarding plaintiffs such other and further relief as to the Court may seem just and proper.

With respect to the Second Cause of Action:

(a) Enjoining the defendant Ashton from disposing of his stock in defendant Trans Industries, Inc. together with the costs and disbursements of this action.

(b) Awarding such other and further relief as to the Court may seem just and proper.

SAXE, BACON & BOLAN

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Y

Peter T. King
One Of Its Attorneys
39 East 68th Street
New York, New York

752-6100

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
MAR 23 1971
S.D. OF N.Y.

- -x

LEONARD DESSER, MELVIN DESSER and JACOB S. LANDESMAN,

Plaintiffs,

-against-

ROY A. ASHTON, JAMES YOUNGBLOOK and TRANS-INDUSTRIES, INC.,

Defendants.

- -x

69 Civil 1767

ANSWER

Defendants for their answer to the second amended complaint herein by their attorneys Shea Gallop Climenko & Gould:

FIRST OFFENSE

1. The second amended complaint fails to state a claim upon which relief can be granted.

SECOND OFFENSE

2. Deny the allegations in paragraphs 1, 2, 3, 8, 13, 14, 15, 16, 17, 18, 20, 21, 23, 24 and 25.

3. Deny knowledge or information sufficient to form a belief as to the truth to the allegations in paragraphs 5, 6, 7 and 12.

4. Deny the allegations in paragraph 19 except they admit that they have not negotiated with plaintiffs.

WHEREFORE, defendants demand judgment dismissing the seconded complaint together with the costs and disbursements of this action.

SHEA GALLOP CLIMENKO & GOULD

By Martin J. Shelton

A Member of the Firm
Attorneys for Defendants
330 Madison Avenue
New York, New York 10017
Tel: 661-3200

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

LEONARD DESSER, MELVIN DESSER
and JACOB S. LANDESMAN,

Plaintiffs,

-against-

ROY A. ASHTON, JAMES YOUNGBLOOD
and TRANS-INDUSTRIES, INC.,

Defendants.

- x

69 Civ. 1767

NOTICE OF MOTION
FOR LEAVE TO FILE
AMENDED COMPLAINT

SIRS:

TAKE NOTICE, that upon the annexed affidavit of ROBERT STEPHAN COHEN, Esq., sworn to April 12, 1973 and upon the pleadings and proceedings heretofore had herein, the undersigned will move this Court, before Magistrate Gerard Goettel at the United States Courthouse (Room No. 503), Foley Square, New York, New York, on the 30th day of April, 1973 at 3:30 P. M. for an Order pursuant to Rule 15(a) of the Federal Rules of Civil Procedure granting the undersigned leave to file an Amended Complaint, a copy of which is annexed hereto as Exhibit "A" on the grounds that justice so requires such an amendment in order that all the issues between the parties

may be fully litigated in this action and in order for the undersigned to set forth in this Complaint their complete claim.

Dated: New York, New York
April 12, 1973

Yours, etc.

LANS FEINBERG & COHEN

By _____
A Member of the Firm

Attorneys for Plaintiffs
360 Lexington Avenue
New York, New York 10017

TO:

MESSRS. SHEA GOULD
CLIMENKO & KRAMER
Attorneys for Defendants
330 Madison Avenue
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

LEONARD DESSER, MELVIN DESSER
and JACOB S. LANDESMAN,

Plaintiffs,

69 Civ. 1767

-against-

AFFIDAVIT

ROY A. ASHTON, JAMES YOUNGBLOOD
and TRANS-INDUSTRIES, INC.,

Defendants.

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

ROBERT STEPHAN COHEN, being duly sworn, says:

1. I am a member of the firm of LANE FEINBERG & COHEN, attorneys for the plaintiffs herein. My firm was substituted, upon plaintiff's application, as attorneys, by order of Judge Lawrence W. Pierce, dated March 21, 1973. Plaintiffs' prior counsel in this matter was the firm of Saxe, Bacon & Bolan. Roy M. Cohn, Esq., of that firm, counsel to the retiring law firm, was in charge of the matter.

2. I am submitting this affidavit in support of the accompanying motion to permit plaintiffs to amend their complaint in the form annexed hereto as Exhibit "A". The prior complaint, which is here sought to be amended, is annexed as Exhibit "B".

3. The action, alleging inter alia, violations by the defendants of Section 10-b-5 of the Securities Exchange Act of 1934 charges that the defendants defrauded the plaintiffs from receiving certain securities in the defendant Trans-Industries, Inc.'s predecessor and was commenced on April 25, 1969. Thereafter, defendants moved on three separate occasions against the complaint claiming that it failed to state a cause of action. The first motion, heard before Judge Lasker of this Court, granted defendants relief (Opinion of Judge Lasker dated 12/31/69). The second motion, attacking the amended complaint, came on to be heard before Judge Levet who granted the motion (Opinion, Judge Levet, dated 6/15/70). The third motion, attacking the second amended complaint, was denied by Judge Motley who held that plaintiffs' second amended complaint was legally sufficient (Opinion of Judge Motley, dated 3/9/71).

4. The gist of all the motions to dismiss was that plaintiffs' causes of action, predicated on violations of the Securities Act, was legally insufficient. Saxe, Bacon & Bolan's third pleading set forth the necessary technical allegations.

5. The amended complaint sought to be interposed here, insofar as the first two causes of action set forth in the second amended complaint and sustained by Judge Motley are not varied or altered. Plaintiffs have merely sought to add, on the theory of pendent jurisdiction, two additional causes of action (a third and fourth cause of action) which rely on the allegations contained in the causes of action previously asserted and sustained.

6. The third cause of action, relying on an agreement which bottoms the Securities Act claim in the first cause of action, alleges a breach of the agreement by the defendant Ashton. The fourth cause of action, relying on the identical state of facts alleges that the defendants, James Youngblood and Trans-Industries, Inc., wrongfully induced Ashton to breach the foregoing agreements. No new matter has been injected into the proceeding.

7. The proposed amended complaint would permit this Court to resolve all of the issues in the instant litigation. There is no surprise because the additional causes of action are based upon all of the facts set forth in a pleading sustained by the Court. There is no substantial prejudice as only one deposition has been conducted and the facts elicited relate to the proposed new causes of action.

8. My firm is prepared to represent to the Court that plaintiffs' disclosure will promptly be conducted by the plaintiffs and they will be made available to the defendants for discovery. We submitted the proposed amended pleading to defendants' counsel the day after Judge Pierce authorized the substitution. We made this motion to permit the amendment within five days after we were advised by defendants' counsel that they would not consent to the amendment. We are prepared to abide by any reasonable limit the Court sets for the completion of disclosure.

9. We respectfully submit that the plaintiffs should not be prejudiced by reason of their prior counsel's failure to assert all their claims or to expeditiously prosecute the litigation. Under the circumstances, therefore, the motion should be granted.

ROBERT STEPHAN COHEN

Sworn to before me this
12th day of April, 1973.

ENDORSEMENT

LEONARD DESSER, et al v. ROY A. ASHTON, et al; 69 Civ. 1767

Plaintiffs' motion in the above case for leave to amend the complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure having come on to be heard by the undersigned and having been referred to the Honorable Gerard L. Goettel, U.S. Magistrate, for hearing and report, and said hearing having been held, and said report having been made on May 10, 1973, and the Court being fully advised, and the Court having received and considered letters dated May 24, 1973, from the plaintiffs and the defendant it is

ORDERED that plaintiffs' motion is granted and a complaint may be filed in the form annexed to the moving papers, and it is

FURTHER ordered that plaintiffs must complete their discovery of the defendants and appear themselves for deposition prior to June 15th, 1973.

SO ORDERED:

_____
U.S.D.J.

DATED: New York, N.Y.
May 4, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LEONARD DESSER, MELVIN DESSER and JACOB S. LANDESMAN,

Plaintiffs,

-against-

ROY A. ASHTON, JAMES YOUNGBLOOD and TRANS-INDUSTRIES, INC.,

Defendants.

----------X

69 Civ. 1767

THIRD AMENDED COMPLAINT

Plaintiffs, by their attorneys, Lans, Feinberg & Cohen, who have been substituted as counsel for plaintiffs on complaining of defendants respectfully allege as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. The causes of action in this Complaint arise under Section 10(b) of the Securities Exchange Act of 1934 (hereinafter called the "Act" as amended) 15 U.S.C. Sections 78(j) and Rule 10 b-5 of the Rules of the Securities and Exchange Commission (hereinafter called the "SEC"), and this Court has jurisdiction by virtue of those sections of the Act and those Rules. This Court also has jurisdiction over the causes of action under its pendent jurisdiction.

2. The violations of the Act described in the Complaint were carried out in whole or in part in the State and Southern District of New York.

3. The defendant used the United States mails and other instrumentalities of interstate commerce in perpetration of the violations of the Act hereinafter set forth.

4. Upon information and belief, defendant Trans-Industries, Inc. is a corporation duly organized and existing under and by the laws of the State of Delaware.

5. Plaintiff Leonard Desser is a citizen and resident of the State of Maryland.

6. Plaintiff Melvin Desser is a citizen and resident of the State of Maryland.

7. Plaintiff Jacob A. Landesman is a citizen and resident of the State of New York.

8. Defendant James Youngblood is a citizen and resident of the State of New York.

9. Transign, Inc. ("Transign") is a corporation duly organized and existing under the laws of the State of Michigan.

10. British American Insurance Co. Ltd. ("British American") is, upon information and belief, a corporation existing under the laws of the Nassau-Bahama Islands.

11. In or about April, May and June 1966, plaintiffs Leonard and Melvin Desser ("Messrs. Desser") were desirous of obtaining a substantial interest in and/or control of Transign -- a corporation whose principal was defendant Youngblood and a corporation about which Messrs. Desser, through their own efforts had obtained certain vital and confidential information ("the confidential information") regarding its financial status.

12. In or about June, 1966, plaintiff Jacob S. Landesman arranged, through intermediaries, a meeting between Messrs. Desser and defendant Roy A. Ashton, the Vice-President of British American. At said meeting the plaintiffs informed defendant Ashton that they were in possession of confidential information regarding Transign and Ashton discussed with the plaintiffs the feasibility of having British-American finance the plantiffs' acquisition of Transign.

13. In said agreement, Ashton, in order to induce the plaintiffs to make known to him their confidential information about Transign, wilfully misrepresented to the plaintiffs that he would not attempt to acquire Transign, or deal with it in any of his corporate capacities, except on terms and conditions agreeable to the plaintiffs in their sole discretion.

14. Subsequent to the June 20th agreement, Ashton wilfully and fraudulently misrepresented to the plaintiffs that the

plaintiffs were to receive 35% of the stock of a new corporation to be formed by the plaintiffs and by British-American, through Ashton, upon the acquisition of A) Transign, and B) of certain valuable rights and processes held by Transign and as consideration for said wilful and fraudulent misrepresentation and in reliance thereon the plaintiffs furnished their confidential information to Ashton. In entering into this agreement, Ashton had no intention of providing plaintiffs with 35% of the stock of the corporation to be formed, but merely made said representation to further his fraudulent scheme and ploy whereby:

a) he would obtain the plaintiffs' confidential information,

b) he would prevent the plaintiffs from proceeding with their intention to attempt to purchase a substantial and/or controlling interest in Transign; and

c) he would be able to transfer the assets of Transign to a corporation in which the plaintiffs would have no interest - i.e. Trans Industries, Inc.

15. In contravention of the agreements described in paragraphs "13" and "14" of this complaint, defendants Ashton and Youngblood caused defendant Trans Industries, Inc. to be formed; caused the assets of Transign to be transferred to Trans Industries; and caused Transign to become a subsidiary of defendant Trans

Industries, a corporation controlled by defendants Ashton and Youngblood. Plaintiffs did not receive their agreed upon 35% of the stock of Trans Industries, or any interest whatever in Trans Industries, Inc. and to date have received no compensation whatever from defendants Ashton, Youngblood and Trans Industries, Inc.

16. At a time prior to the occurrences described in paragraph "15" of this complaint, defendant Youngblood obtained full knowledge of the agreements between Ashton and the plaintiff described in paragraphs "13" and "14" of this Complaint and by reason of his action detailed in paragraph "15" of this Complaint, Youngblood ratified Ashton's fraudulent conduct described in paragraphs "11" through "19" of this Complaint and is liable for the damages incurred therefrom by plaintiffs.

17. Trans Industries, Inc. was at its inception and upon information and belief still is controlled by defendants Ashton and Youngblood and is thereby liable for the damages incurred by plaintiffs as a result of said defendants' fraudulent conduct described in paragraphs "11 though 19" of this Complaint.

18. To this date, defendants Ashton, Youngblood and Trans Industries, Inc. have refused to negotiate with plaintiffs concerning the amount owing to plaintiffs as a result of the damages incurred by plaintiffs as a result of defendants' fraudulent conduct described in paragraphs "11 through 19" of this Complaint.

19. The conduct of defendants described herein in paragraphs "11 though 19" was carried out by the use of telephone and the mails combined and consisted of acts which constituted:

1. a device, scheme or artifice to defraud;
2. untrue statements of material facts and omissions to state material facts in order to make the statements not misleading, which statements were made with knowledge of reasonable ground to believe that they were untrue or misleading, and
3. acts, practices and course of business all of which operated as a fraud on plaintiffs in connection with the purchase or sale of a security, in violation of Section 10(b) of the Act and Rule 10b-5 of the SEC.

20. As a result of plaintiffs' reliance upon defendants fraudulent misrepresentations, as described aforesaid in paragraphs "11 through 19" of this Complaint, plaintiffs have suffered actual damages in the amount of $500,000.00.

AS AND FOR A SECOND CAUSE OF ACTION

21. Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "1 through 19" of the Complaint herein with the same force and effect as though set forth in full.

22. Upon information and belief, defendant Ashton is disposing of his stock in defendant Trans Industries, Inc. in order

to avoid his obligations to plaintiffs, all to plaintiff's unreparable harm.

23. Plaintiffs have no adequate remedy at law.

24. By reason of the foregoing, it is essential that an injunction be issued enjoining Ashton from disposing of his stock in Trans Industries, Inc.

AS AND FOR A THIRD CAUSE OF ACTION

25. Plaintiffs repeat, reiterate and reallege the allegations contained in paragraphs "1" through "24" of the Complaint herein with the same force and effect as though set forth in full.

26. The agreement by Ashton alleged in paragraph "13" of this Complaint, which was modified and supplemented upon certain terms and conditions by an agreement dated August 31, 1966, provided that Ashton would not attempt to acquire Transign, or deal with it in any of his corporate capacities, was reduced to writing, duly executed, and dated June 20, 1966.

27. The acts of Ashton alleged in paragraph "15" of this Complaint to wit, the formation of Trans Industries, Inc., the causing of the assets of Transign to be transferred to Trans Industries, Inc., and the exclusion of plaintiff's from participating in the offering of Trans Industries, Inc.'s securities to the public, was a violation and breach of the agreements.

28. By reason of the foregoing plaintiffs have been damaged in an amount which is presently undeterminable but which shall be at least five hundred ($500,000) thousand dollars.

AS AND FOR A FOURTH CAUSE OF ACTION

29. Upon information and belief James Youngblood and Trans Industries, Inc., at all material times, had notice and knowledge of the written agreement between plaintiffs and Ashton.

30. Notwithstanding said knowledge by James Youngblood and Trans Industries, Inc. of the prohibition imposed on Ashton by the agreement, said Defendants wilfully, maliciously and wrongfully induced and enticed Ashton to breach his agreement with plaintiffs so that he would enter into an agreement with them.

31. By reason of the foregoing, plaintiffs have been damaged in an amount which is presently undeterminable but which shall be at least five hundred ($500,000) thousand dollars.

WHEREFORE, plaintiffs demand judgment as follows:

1. On the First Cause of Action:

(a) Awarding them damages in the sum of $500,000.00.

(b) Awarding them punitive damages in the sum of $1,000,000.00.

(c) Awarding plaintiffs the costs of this action and allowing reasonable attorneys fees to be paid by defendants.

II. On the Second Cause of Action:

(a) Enjoining the defendant Ashton from disposing of his stock in defendant Trans Industries, Inc.

III. On the Third Cause of Action:

(a) Damages in the sum of $500,000.00; and

IV. On the Fourth Cause of Action:

(a) Damages in the sum of $500,000.00.

V. On all Causes of Action costs, disbursements, interest and such other and further relief as may be just and proper.

LANS FEINBERG & COHEN

By_____
A member of the Firm
Attorney's for Plaintiffs
360 Lexington Avenue
New York, New York 10017
Tel: 212-OX.7-0020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LEONARD DESSER, MELVIN DESSER and JACOB S. LANDESMAN,

Plaintiffs,

-against-

ROY A. ASHTON, JAMES YOUNGBLOOD, and TRANS-INDUSTRIES, INC.,

Defendants.

----------x

69 Civil 1767
(LWP)
ANSWER

Defendants, by their attorneys Shea Gould Climenko & Kramer, for their answer to the third amended complaint herein:

FIRST DEFENSE

1. Deny each and every allegation in paragraphs 1, 2, 3, 8, 13, 14, 15, 16, 17, 19, 20, 22, 23, 24, 27, 28, 29, 30 and 31 of the complaint.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 5, 6, 7 and 11 of the complaint.

3. Deny each and every allegation in paragraph 18 of the complaint except admit that defendants have not negotiated with plaintiffs.

4. Deny each and every allegation of paragraph 26 of the complaint except admit that defendant Ashton signed purported

agreements dated June 20, 1966 and August 31, 1966, and allege that the purported agreement dated June 20, 1966 was induced by fraud as set forth more particularly below and was null, void and of no effect.

5. Answering paragraphs "21" and "25" of the complaint defendants repeat and reallege each and every denial and averment made above to the paragraphs of the complaint referred to therein.

SECOND DEFENSE

6. The third amended complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

7. In order to induce defendant Ashton to enter into the alleged agreement dated June 20, 1966 plaintiffs stated and represented to defendant Ashton that plaintiffs Leonard and Melvin Desser had been given exclusive authority to negotiate any sale of Transign and that said plaintiffs had been empowered to negotiate such sale on whatever terms said plaintiffs found acceptable.

8. The statements and representations so made by plaintiffs were false and fraudulent and were known to plaintiffs to be false and fraudulent when made.

9. In truth and in fact, the plaintiffs Desser had no arrangement whatsoever with Transign and no authority whatsoever to act on behalf of Transign.

10. Defendant Ashton believed such statements and representations to be true and was induced thereby to enter into the alleged agreement, and would not have entered into said agreement had he known the truth with regard to such statements and representations.

FOURTH DEFENSE

11. Defendant, James Youngblood ("Youngblood") is not now and at all times relevant herein, was not a resident of the State of New York.

12. The summons and complaint herein were served upon defendant Youngblood in Bloomfield Hills, Michigan.

13. Defendant Trans-Industries, Inc. is a corporation duly organized and existing under the laws of the State of Delaware, with its principal office in the State of Michigan. Said defendant has no office in the State of New York and does no business therein.

14. The summons and complaint herein were served upon defendant Trans-Industries, Inc. in Bloomfield Hills, Michigan.

15. By virtue of the above, this Court lacks personal jurisdiction over defendants Youngblood and Trans-Industries with respect to the third and fourth causes of action alleged in the third amended complaint herein.

FIFTH DEFENSE

16. The alleged agreement referred to in paragraph 14 of the complaint pursuant to which plaintiffs were allegedly to receive 35% of the stock of a new corporation to be formed by the plaintiffs and by British American, through Ashton, upon the acquisition of (A) Transign and (B) of certain valuable rights and processes held by Transign was not in writing nor is there any written memorandum thereof signed by defendants or any of them and such alleged agreement is void.

SIXTH DEFENSE

17. The alleged agreement dated June 20, 1966 purported to forbid defendant Ashton, for an unlimited and undefined period of time, from dealing with Transign in any manner or in any capacity except on terms and conditions acceptable to plaintiffs in their sole discretion, and purported to forbid defendant Ashton, for an unlimited and undefined period of time, from revealing any information received from plaintiffs about Transign to anyone except with the express permission of plaintiff.

18. For the foregoing reasons, the alleged agreement dated June 20, 1966 was so broad in scope and unlimited in duration that it constituted an unreasonable restraint of trade and was contrary to public policy, null, void and of no effect.

WHEREFORE, defendants demand judgment dismissing the third amended complaint, together with the costs and disbursements of this action.

SHEA GOULD CLIMENKO & KRAMER

By _____
(A member of the Firm)
Attorneys for Defendants
330 Madison Avenue
New York, New York 10017
(212) 661-3200

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

U. S. DISTRICT COURT
FILED
MAY 16 1974
S. D. OF N. Y.

LEONARD DESSER, MELVIN DESSER
and JACOB S. LANDESMAN,

Plaintiffs,

-against-

ROY A. ASHTON, JAMES YOUNGBLOOD
and TRANS-INDUSTRIES, INC.,

Defendant.

----------x

Docket No.
69 Civ. 1767

Cal. No.

PRE-TRIAL ORDER

On April 23, 1974, Lans Feinberg & Cohen, as counsel for the plaintiffs, and Shea Gould Climenko & Kramer counsel for the defendants, appeared before the Court at a pre-trial conference, and the following action was taken:

1. The pleadings were agreed to be deemed amended in accordance with the framing of the agreed upon issues in paragraph 9 of this pre-trial order, but not to the extent that the parties differ on certain of the issues.

2. The parties agreed that the trial of this action should be based upon this order and upon the pleadings as amended.

3(a) The parties stipulated that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

* * *

(v) In addition, plaintiffs demand on all causes of action interest since June 20, 1966, costs, disbursements, and such other and further relief as may be just and proper.

8. The parties also agree on the following matters:

(a) Plaintiffs at this time expect to require three trial days; and

(b) defendants at this time expect to require three trial days.

9. The parties agree that the following are issues to be tried:

(a) Did the defendants defraud plaintiffs, within the meaning of Rule 10b-5 promulgated by the Securities and Exchange Commission under Section 10 of the Securities Exchange Act of 1934, in connection with the purchase or sale of securities?

(b) If plaintiffs were so defrauded and if plaintiffs relied thereon, were plaintiffs damaged thereby and in what manner and in what amount were they damaged?

(c) Did plaintiffs make material fraudulent representations to defendant Ashton in order to induce him to sign the alleged agreement dated June 20, 1966, and, if they did, and defendant Ashton relied thereon, is such alleged agreement void and unenforceable by plaintiffs?

(d) Did defendant Youngblood know of and ratify the alleged fraud of defendant Ashton, and if he did, is he liable for the damages caused by such fraud?

(e) Was defendant Trans-Industries controlled by defendants Ashton and Youngblood, and if so, is Trans-Industries liable for the damages caused by the alleged fraud?

(f) Is the alleged agreement dated June 20, 1966, void and unenforceable by plaintiffs as contrary to public policy and law as an unreasonable restriction on defendant Ashton's freedom to contract and on his ability to earn a living?

(g) Did defendant Ashton materially breach the agreement of June 20, 1966, and if so, in what manner did he breach the agreement?

(h) If Ashton is liable to plaintiffs, is there an adequate remedy at law or are plaintiffs entitled to an injunction to prevent Ashton from selling any additional shares of Trans-Industries owned by him?

In addition, plaintiffs contend that the following issues are to be tried:

(i) If defendant Ashton did materially breach the agreement, were plaintiffs damaged by or were defendants unjustly enriched by such breach and if so, in what manner and in what amount?

(j) Did defendants Youngblood and Trans-Industries induce Ashton to breach the agreement dated June 20, 1966?

(k) Are plaintiffs entitled to a finder's fee as an alternative remedy for breach of the agreement dated June 20, 1966, as amended, by reason of the acquisition of the assets of Transign by Trans-Industries?

The defendants contend that the additional issues to be tried are as follows:

(l) If defendant Ashton did materially breach the agreement, did he do so before defendant Youngblood concluded that he was not willing to deal with plaintiffs and before he so advised plaintiffs, and, if so, were plaintiffs damaged by such breach?

(m) If defendant Ashton did materially breach the alleged agreement, did defendants Youngblood and Trans-Industries maliciously induce such alleged breach?

(n) Defendants contend that no claim for a finders' fee has been asserted in this action and that there is no issue to be tried with respect to such a claim. Defendants contend that, if the Court finds that such an issue is raised by the pleadings as now in effect, or permits an amendment of the pleadings to raise such a claim, then the Court must consider the following:

(1) whether plaintiffs' claim for an alleged finders' fee is barred by the Statute of Frauds;

(2) did plaintiffs ever produce a party ready, willing and able to purchase Transign on the terms offered by Youngblood; and

(3) were plaintiffs the procuring cause of the transaction by which Trans-Industries purchased the stock of Transign and certain patents from defendant Youngblood?

* * *

SHEA GOULD CLIMENKO KRAMER & CASEY
330 MADISON AVENUE
NEW YORK, NEW YORK 10017

AREA CODE 212
661-3200
CABLE ADDRESS
HOLMANG

MILES F. McDONALD
SAUL S. STREIT
CHRISTOPHER C. McGRATH
OF COUNSEL

May 7, 1975

Honorable Lawrence W. Pierce
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re Desser, et al. vs. Ashton, et al.
File No. 69 Civ. 1767 (L.W.P.)

Dear Judge Pierce:

In accordance with the permission which Your Honor granted during the pre-trial conference held in chambers on May 6, 1975, defendants submit the following amendments to be made to the pre-trial order herein:

1. Defendants request that the following additional contention be added to paragraph 3(c) (Defendants' Contentions) of the pre-trial order:

"Defendant James Youngblood and defendant Trans-Industries, Inc. were served with process herein in Bloomfield Hills, Michigan. At all relevant times, defendant Youngblood was and still is a non-resident of the State of New York. Defendant Trans-Industries, Inc. is a Deleware Corporation with its principal office in the State of Michigan. Trans-Industries, Inc. does not have any office in the State of New York and does not transact business therein. Accordingly, this Court lacks personal jurisdiction over defendants Youngblood and Trans-Industries, Inc. with respect to the third and fourth alleged causes of action in the third amended complaint. In addition, defendants contend that, even if the Court has personal jurisdiction over all defendants, alleged pendent jurisdiction does not exist; and, in any event, even if the alleged pendent common law claims arise out of the same nucleus of operative fact as the alleged federal claims and are properly pendent thereto, the Court should decline to exercise jurisdiction over the alleged pendent claims."

2. Defendants also request that paragraph 9 of the pre-trial order ("Issues to be Tried") be amended by adding thereto the following issue which defendants contend must be tried:

"Whether this Court lacks personal jurisdiction over defendants Youngblood and Trans-Industries, Inc. with respect to the third and fourth alleged causes of action; in the alternative, even if this Court has personal jurisdiction, whether the alleged pendent claims arise out of the same nucleus of operative fact as the alleged federal claim and whether pendent jurisdiction exists as a matter of law; and, if personal and pendent jurisdiction exist as a matter of law, whether the Court, as a matter of discretion, should decline to exercise jurisdiction over the alleged pendent claims."

In accordance with Your Honor's instructions, I understand that the original of this letter will be affixed to the pre-trial order and that the pre-trial order will be deemed amended accordingly.

Respectfully submitted,

MARTIN I. SHELTON

MIS:ajs

cc: Lans Feinberg & Cohen, Esqs.
Attorneys for plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMO ENDORSED

LEONARD DESSER, MELVIN DESSER and JACOB S. LANDESMAN,

Plaintiffs,

-against-

ROY A. ASHTON, JAMES YOUNGBLOOD and TRANS-INDUSTRIES, INC.,

Defendants.

69 Civ. 1767 (L.W.F.)

NOTICE OF MOTION

U.S. DISTRICT COURT
FILED
SEP 2 1975
S. D. OF N. Y.

S I R S :

PLEASE TAKE NOTICE that upon the annexed Statement Pursuant to Rule 9(g), dated August 28, 1975, the annexed affidavit of Martin I. Shelton, sworn to on August 22, 1975 and the exhibits thereto annexed, and upon all prior proceedings had herein, the undersigned will move this Court, before Honorable Lawrence W. Pierce, United States District Judge, at the United States Courthouse, Foley Square, New York, New York, on the 10th day of September, 1975 at 10:00 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, for an order pursuant to Rules 12(d), 12(h) and 56 of the Federal Rules of Civil Procedure, dismissing the complaint for lack of subject matter jurisdiction or, in the alternative, dismissing the fourth cause of action for lack of jurisdiction over the persons of defendants Youngblood and Trans-Industries, Inc., and

for such other and further relief as to this Court shall seem just and proper.

Dated: New York, New York
August 28, 1975

Yours, etc.
SHEA GOULD CLIMENKO KRAMER & CASEY

By: _____
(a member of the firm)
Attorneys for defendants
330 Madison Avenue
New York, New York 10017
Tel. No. (212) 661-3200

TO:
LANS FEINBERG & COHEN
Attorneys for plaintiffs
555 Madison Avenue
New York, New York 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

LEONARD DESSER, MELVIN DESSER and JACOB S. LANDESMAN,	:	Index No. 69 Civ. 1767
Plaintiffs,	:	
-against-	:	
ROY A. ASHTON, JAMES YOUNGBLOOD and TRANS-INDUSTRIES, INC.,	:	AFFIDAVIT IN SUPPORT OF MOTION
Defendants.	:	

- - - - - - - - - - - - - - - - - - - X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARTIN I. SHELTON, being duly sworn, deposes and says:

1. I am a member of the firm of Shea Gould Climenko Kramer & Casey, attorneys for defendants in this action. I make this affidavit in support of defendants' motion for judgment dismissing the complaint pursuant to Rules 12(d), 12(h) and 56, F.R.C.P., on the ground that this Court lacks jurisdiction of the subject matter of this action. In this affidavit, I will describe the procedural history of the action and will collect and point out certain facts and admissions contained in the Pre-Trial Order and in pre-trial depositions which, I believe, support defendants' motion.

2. Although the sole basis for federal jurisdiction in this case is plaintiffs' allegation that defendants have violated Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78J(b)), defendants contend that the acts complained of did not involve any fraud in connection with the purchase or sale of any

security as required by Section 10(b); that plaintiffs were not purchasers or sellers of any security; and that, accordingly, the federal claims should be dismissed. Defendants also contend that the alleged pendent claims do not involve a common nucleus of operative fact with the alleged federal claims and that they should be dismissed as well. In addition, defendants contend that the federal claims asserted against defendants Youngblood and Trans-Industries, Inc. are patently insubstantial and cannot form the basis for valid extraterritorial service upon these defendants, particularly with respect to the "pendent" claims.

The Nature of the Action

3. Plaintiffs claim that by reason of defendant Ashton's alleged fraud (which they contend was ratified by defendants Trans-Industries, Inc. and Youngblood) they were deprived of the opportunity to purchase securities. Plaintiffs allege that defendants' conduct violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. In addition, in two "pendent" claims, plaintiffs contend that defendant Ashton breached a contract between him and plaintiffs, and that defendants Trans-Industries and Youngblood induced the breach.

Prior Proceedings

4. The original complaint in this action was filed on or about April 28, 1969. Defendants' motion to dismiss the original complaint for failure to state a claim was granted by Judge Lasker on December 31, 1969 in a memorandum opinion, a copy of which is annexed hereto as Exhibit "A".

5. Defendants moved to dismiss the first amended complaint (which was served on or about February 24, 1970) for failure to

state a claim and for lack of subject matter jurisdiction. The motion was granted by Judge Levet in a memorandum opinion dated April 15, 1970, a copy of which is annexed hereto as Exhibit "B". Judge Levet held that plaintiffs had still not properly alleged fraud, and granted plaintiffs leave to serve a second amended complaint.

6. The second amended complaint was served on or about May 5, 1970 and defendants moved to dismiss it for failure to state a claim. Judge Motley denied the motion on or about March 9, 1971 with a brief endorsement in which she stated:

> "The within second amended complaint now states a cause of action under section 10(b) and rule 10(b)(5), 15 U.S.C. 78(j). See the prior opinions and order of this court: 1) the opinion of Judge Lasker of 12/31/69, and 2) the opinion of Judge Levet of 4/15/70."

7. During the following two years, there was very little activity in the case. Defendants conducted the deposition of one of the plaintiffs, but the plaintiffs did not conduct any discovery. In or about March 1973, plaintiffs retained new attorneys who moved for leave to serve and file a third amended complaint. The third amended complaint retained the claims which had been alleged in the second amended complaint and added two alleged "pendent" causes of action. Over defendants' opposition, the motion to amend the complaint was granted on or about June 4, 1973.

8. Issue was joined on the third amended complaint on or about October 31, 1973. Thereafter, the parties completed pre-

trial discovery and a Pre-Trial Order was entered in or about May 1974.*

The Pleadings

9. The first cause of action in the third amended complaint alleges that plaintiffs wanted to obtain an interest in Transign, Inc. ("Transign"), a Michigan corporation which was owned and controlled by defendant Youngblood. Plaintiffs allege that they had certain confidential information about Transign and that defendant Ashton fraudulently induced them to disclose that information to him, and to introduce him to defendant Youngblood by misrepresenting to plaintiffs: first, that he would not attempt to acquire or deal with Transign without their consent; and second, that they would receive 35% of the stock of a new corporation which was to be formed by plaintiffs and British-American Insurance Co., Ltd. ("British-American"), Ashton's employer, to acquire Transign. Although plaintiffs claim that there was an agreement between them and British-American for the formation of a new company and the acquisition of Transign on the terms just described, British-American is not a defendant. Plaintiffs alleged that, contrary to the "representations," and the

* In accordance with permission granted by the Court, the Pre-Trial Order was amended by a letter dated May 7, 1975, which added certain issues and contentions inadvertently omitted from the Pre-Trial Order. In accordance with the directions of the Court, defendants filed their proposed findings of fact and conclusions of law on or about March 7, 1975. To date, defendants have not received any findings of fact or conclusions of law from plaintiffs.

"agreement," defendants Ashton and Youngblood caused defendant Trans-Industries, Inc. ("Trans-Industries") to be formed and caused it to acquire Transign. The complaint alleges that:

> "Plaintiffs did not receive their agreed upon 35% of the stock of Trans-Industries, or any interest whatever in Trans-Industries, Inc. and to date have received no compensation whatever from defendants Ashton, Youngblood and Trans-Industries, Inc." (complaint, paragraph 15)

The complaint then goes on to allege that the conduct just described constituted a violation of Section 10(b) of the Securities Exchange Act of 1934 and of Rule 10b-5 thereunder. The second cause of action requests an injunction to prevent defendant Ashton from disposing of his stock in Trans-Industries. The third cause of action (which is one of the claims added by the third amended complaint) alleges that defendant Ashton breached his agreement not to deal with Transign except on terms acceptable to plaintiffs. The fourth cause of action (another claim added by the third amended complaint) alleges that defendants Youngblood and Trans-Industries knew of this alleged agreement and induced Ashton to breach it.

10. The answer denies the material allegations of the complaint, denies that defendants were guilty of any fraud or misrepresentation and asserts the following affirmative defenses: that the complaint fails to state a claim upon which relief can be granted (second defense); that the alleged agreement on which the complaint is based was induced by fraud on the part of plaintiffs (third defense); that service upon defendants Youngblood

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and Trans-Industries with respect to the alleged "pendent" cause of action has not been proper and that the Court lacks personal jurisdiction over such defendants (fourth defense); that one of the alleged agreements referred to in the complaint is barred by the statute of frauds (fifth defense); and that the alleged agreement by Ashton not to deal with Transign is illegal and contrary to public policy (sixth defense).

11. It is difficult to understand from the complaint whether plaintiffs claim that they were defrauded in connection with a purchase of stock of Transign, of some other company to be formed to acquire Transign, or of Trans-Industries. Judge Lasker, in analyzing the first complaint, concentrated on the alleged agreement by which plaintiffs would receive 35% of the stock of "a new corporation to be formed" by plaintiffs and by British-American to acquire Transign. He thought that the complaint, if "charitably" construed, alleged that:

> "But for defendants' fraud their acquisition of the stock which it was 'agreed' they would receive would have been consummated."

In holding that the amended complaint lacked only a proper allegation of fraud, Judge Levet relied on Judge Lasker's interpretation of the complaint, but seemed to think that the alleged agreement to purchase securities was in writing. He stated:

> "[Judge Lasker] appeared to suggest that the alleged written agreement signed by plaintiffs and defendant Ashton was sufficient foundation for a federal claim under Section 10(b)."
>
> * * *
>
> "There is some authority for the proposition that a contractual agreement to purchase or sell securities which is not consummated by reason of defendants' fraud is actionable under Section 10(b)."

12. The agreed facts contained in the Pre-Trial Order, coupled with plaintiffs' own contentions and other admissions, show beyond any doubt, contrary to the allegations on which the complaint was sustained as a pleading, that plaintiffs did not purchase or sell any security of Transign, Trans-Industries or any other company; that plaintiffs did not have any contract or agreement to purchase or sell any security; and that, at most, plaintiffs were offered an opportunity to purchase a business, which they were unable to take advantage of because they could not obtain financing. As the accompanying memorandum of law demonstrates, under the Birnbaum rule (Birnbaum v. Newport Steel Corp., 193 F. 2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956 (1952)) and the recent Supreme Court decision in Manor Drug Stores v. Blue Chip Stamps, 43 U.S.L.W. 4704 (June 10, 1975) a potential purchaser who is dissuaded, defrauded or prevented from purchasing securities has no cause of action under Section 10(b) and Rule 10b-5.

Plaintiffs had no agreement to purchase Transign stock

13. The undisputed facts set out in the Pre-Trial Order state that prior to June 1966, plaintiffs had been "offered the opportunity" to purchase Transign. The facts brought out on plaintiffs' oral depositions, however, make it clear that plaintiffs never took advantage of this opportunity and never had any actual agreement, written or oral, to purchase Transign or any stock of Transign. According to the testimony of Leonard Desser, Mr. Youngblood told the Dessers at an early meeting with them that he would be interested in selling Transign for $2 million,

cash. According to Leonard Desser's testimony:

> "Q. What was the response of Melvin Desser and you when Mr. Youngblood said that he would be interested in selling Transign for $2 million, cash?
>
> "A. We thought we could get it financed for ourselves to buy it.
>
> "Q. How did you leave it? That you would get back to Youngblood, or he was to get back to you, or what?
>
> "A. We were to get back to him." (Leonard Desser tr. p. 10).

Melvin Desser had apparently not even discussed the form of the purchase of Transign with Youngblood except to conclude that Youngblood wanted "cash" and did not want a merger. (Melvin Desser tr. p. 10). Melvin Desser testified that a joint proposal was made by the Dessers and British-American to Youngblood by a letter of intent which was presented to Youngblood at a meeting but was never signed. (Melvin Desser tr. p. 29). Melvin Desser further testified that he did not accept Youngblood's alleged suggestion that they sign an agreement to the exclusion of British-American because the Dessers did not have the necessary financing. Melvin Desser testified:

> "A. We had a meeting, and after Courtney* had learned as much as he could about it, it seemed that we were at -- we were going nowhere, and Ashton and Courtney asked to be excused and left us with Youngblood, who wanted to discuss it.
>
> I told Jim, meaning Youngblood, that I wasn't very happy with the way the deal was going, and Jim's remarks to me were, he says, 'The hell with them; we will strike their names out of the agreement and just leave your name in, and I will sign it with you.'
>
> I said, 'That is not necessary, Jim, because I haven't got the financing at this time, but I will get it and as long as you will give me your word that it is my deal,' and he said, 'Unquestionably it is your deal.' (Melvin Desser tr. p. 32).

---

* Thomas Courtney, another employee of British-American.

After the proposed purchase of Transign by British-American had fallen through, the Dessers approached other companies in an effort to obtain financing but were apparently unsuccessful (Leonard Desser tr. p. 55), and they tried to persuade Youngblood to let them continue to try to obtain financing. Melvin Desser recounted a conversation with Youngblood as follows:

> "A. He told me the deal had fallen through, and that there was not going to be a deal with them, they were too cute, and I indicated to him that I still felt that I could get the financing personally, and he said he would rather I wouldn't and he wasn't interested and he didn't want to go any further." (Melvin Desser tr. p. 45).

Thus, plaintiffs never had an agreement to purchase Transign because, by their own admission, they were never able to obtain the necessary financing.

Plaintiffs had no agreement to
<u>purchase stock of Trans-Industries</u>

14. Although plaintiffs allege in their complaint and in the Pre-Trial Order that defendant Ashton agreed that they would received 35% of the stock of a company "to be formed by plaintiffs and by British-American" to acquire Transign, it is apparent from the pre-trial depositions that there was no such agreement. By plaintiffs' own admission, their "agreement" was to obtain a share of a company which did not even exist at the time the "agreement" was made. Although plaintiffs claim that their "agreement" was made during the summer of 1966, it is apparent that the "agreement" had nothing to do with Trans-Industries, which did not acquire Transign until late September 1967, more than a year after the alleged "agreement." The public offering of Trans-Industries stock, on the basis of which plaintiffs compute their damages, did not take place until the end of January 1969, more than 2-1/2 years after the alleged "agreement" which forms the basis of the complaint.

15. It is clear from the examinations before trial that plaintiffs and defendant Ashton never had an "agreement" as to what portion of Transign plaintiffs and British-American might acquire but merely discussed tentative proposals which all parties understood would not be binding or effective until approved by the Board of British-American. Leonard Desser conceded that the alleged "agreement" to provide plaintiffs with 35% of the stock of a company to be formed by plaintiffs and British-American was never reduced to writing (Leonard Desser tr. p. 32-33). And Melvin Desser, in describing his very first meeting with Ashton, acknowledged that the proposal would require approval by Ashton's superiors at British-American:

"Q. When he had signed that letter, had you at that time discussed the terms on which you might make a joint acquisition of this company?

"A. Yes.

"Q. What had you discussed?

"A. We wanted 50 per cent of the deal.

"Q. That was your proposal to Ashton?

"A. We wanted actually 60 per cent of the deal. The insurance company was going to be paid interest on their money, and we proposed to put up $400,000 between us, and we would participate to the extent of our percentage in the deal.

"Q. Do you mean $400,000 equity?

"A. Right.

"Q. Where was the remaining $1.6 million?

"A. British-American was supposed to supply the $1.6 million.

"Q. During the course of this meeting, what was said about this proposal?

"A. He said he couldn't make a deal for the company, for British-American. Mr. Lee wouldn't go for it, and finally, after much conversation, we agreed on a 65-35.

"Q. Who is Mr. Lee?

"A. Mr. Lee is suppose to be -- was represented to us as the chairman of the board of British-American and four or five other insurance companies based in Florida, Gulf something, and other ones." (Melvin Desser tr. pp. 22-23) (emphasis added).

Although Melvin Desser claimed that an agreement was reached at that very meeting on the percentage of debt and equity interests the parties were to own, (Melvin Desser tr. p. 24), he testified that plaintiffs subsequently prepared a "proposal" for Ashton (Melvin Desser tr. p. 24). When Ashton was handed the "proposal", he advised the Dessers that "Tom [Courtney] would have to see it." (Melvin Desser tr. p. 27). Courtney did see the proposal, as Leonard Desser testified, but "was unhappy with it, " and "he didn't think the people would go along with it." (Leonard Desser tr. p. 43). When asked whether Courtney told the Dessers "what he thought his people might be interested in," Leonard Desser replied:

> "I can say positively not, because there was no counteroffer type of thing." (Leonard Desser tr. p. 43) (emphasis supplied).

Thus, it is clear from plaintiffs' own admissions that they had no agreement to purchase stock of Trans-Industries or of any company "to be formed by plaintiffs and by British-American" to acquire Transign.

Plaintiffs' damages are speculative

16. The speculative nature of plaintiffs' damage computation, as contained in the Pre-Trial Order, underscores the fact that plaintiffs had no agreement to purchase 35% of the stock of Trans-Industries. Plaintiffs claim in their pre-trial depositions that they had an agreement to purchase 35% of the common stock of

a company to be formed by plaintiffs and by British-American to acquire Transign. For their 35% share of the equity of this company, they were to pay $140,000. In computing their damages in the Pre-Trial Order, however, plaintiffs claim that 1/3 of Trans-Industries would have cost $43,750. They claim that the stock had a value of $1,837,500. (See Pre-Trial Order, p. 9). Thus, in computing the cost of the alleged 35%, they did not use the cost which had been "agreed" upon, but used the cost which the original stockholders of Trans-Industries paid in September 1967 for common stock of Trans-Industries which they acquired in accordance with a completely different capital structure from the one proposed by plaintiffs in the Summer of 1966. In computing the value of this alleged 35% of Trans-Industries, they did not use the value of the "agreed" upon company in 1966, but used the selling price at which Trans-Industries sold 500,000 newly issued shares pursuant to a public offering in January 1969, 2-1/2 years after the alleged agreement between plaintiffs and Ashton. This stock was sold by the Company, not by the original shareholders, and was not restricted stock but registered stock. Moreover, prior to making this public offering, Trans-Industries had acquired a number of different companies and businesses in addition to Transign. Thus, plaintiffs' computation of damages has no relation to their claim as expressed in the complaint. The reason, defendants submit, is that the stock which plaintiffs claim they had a contract to purchase did not exist at the time of the alleged contract, and, in fact, never came into existence. Most importantly, as the admissions detailed above demonstrate, plaintiffs never did have an agreement to purchase stock of Trans-Industries, Transign or of any company to be formed by "plaintiffs and by British-American" to purchase Transign.

The "federal claims" against Youngblood
and Trans-Industries are insubstantial

17. It is not alleged that Youngblood or Trans-Industries was a party to any agreement with plaintiffs and it is not alleged that Youngblood or Trans-Industries made any fraudulent representations to plaintiffs. Indeed, plaintiffs claim that Ashton made his alleged fraudulent representations to them before he even met Youngblood or knew Youngblood's name or that of his Company, Transign. The only allegation which purports to state a "federal" claim against Youngblood and Trans-Industries is contained in paragraphs 15, 16 and 17 of the complaint, which state in relevant part:

> "15. In contravention of the agreements described in paragraphs '13' and '14' of this complaint, defendants Ashton and Youngblood caused defendant Trans-Industries, Inc. to be formed caused the assets of Transign to be transferred to Trans-Industries; and caused Transign to become a subsidiary of defendant Trans-Industries, a corporation controlled by defendants Ashton and Youngblood...
>
> "16. At a time prior to the occurrences described in paragraph '15' of this complaint, defendant Youngblood obtained full knowledge of the agreements between Ashton and the plaintiff described in paragraphs '13' and '14' of this Complaint and by reason of his action detailed in paragraph '15' of this Complaint, Youngblood ratified Ashton's fraudulent conduct described in paragraphs '11' through '19' of this Complaint and is liable for the damages incurred therefrom by plaintiffs.
>
> "17. Trans-Industries, Inc. was at its inception and upon information and belief still is controlled by defendants Ashton and Youngblood and is thereby liable for the damages incurred by plaintiffs as a result of said defendants' fraudulent conduct described in paragraphs '11' through '19' of this Complaint."

As defendants will demonstrate in the accompanying memorandum of law, the alleged federal claims against defendants Youngblood and Trans-Industries have even less substance than the alleged federal claims against defendant Ashton.

18. As appears from the returns of service which are annexed hereto as Exhibits "C" and "D", defendant Youngblood was served by substitute service at his home in Bloomfield Hills, Michigan. Trans-Industries was served at its office in Bloomfield Hills, Michigan. Defendants submit that the patently insubstantial federal claims against defendants Youngblood and Trans-Industries do not provide an adequate basis for such extraterratorial service of process, particularly with respect to plaintiffs' pendent claims.

19. For all of the foregoing reasons, defendants submit that this Court lacks jurisdiction of the subject matter of this action, and, in any event, lacks jurisdiction over the persons of defendants Youngblood and Trans-Industries, and that defendants' motion for judgment dismissing the complaint should be granted in all respects.

Martin I. Shelton

MARTIN I. SHELTON

Sworn to before me this
22nd day of August, 1975.

Ralph I. Beil

RALPH I. BEIL, Notary Public
State of New York, No. 31-4520767,
Qualified in New York County
Certificate filed in New York County,
Commission Expires March 30, 19[illegible]

DESSER v. ASHTON, 69 Civ. 1767

U.S. DISTRICT COURT
FILED
JUN 5 1975
S.D. OF N.Y.

ENDORSEMENT

Defendants Roy A. Ashton, James Youngblood, and Trans-Industries, Inc. have moved for summary judgment and for dismissal of this action--which is now more than six years old--on the eve of the scheduled trial. A principal basis for the motion is the contention of the moving parties that this case is controlled by the Supreme Court's recent decision in Blue Chip Stamps v. Manor Drug Stores, 43 U.S.L.W. 4707 (U.S. June 9, 1975). In that case, the Court adopted the rule, originally set forth in Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952), that in order to have a cause of action under Section 10(b) of the 1934 Exchange Act, 15 U.S.C. §78j, and Rule 10b-5, a plaintiff must have been a purchaser or seller of the securities with respect to which material misrepresentations are claimed to have been made. Manor Drug, supra, at 4709.

The Court does not agree with the moving defendants that Manor Drug requires dismissal of this action. In adopting the Birnbaum rule, the Court did not purport to eliminate the established interpretation of that rule to the effect that persons with contracts to purchase or sell securities stand in the same position as actual purchasers or sellers for the purposes of bringing an action under Section 10(b) and Rule 10b-5. See Walling v. Beverly Enterprises, 476 F.2d 393 (9th Cir. 1973); Allico National Corp. v. Amalgamated Meat Cutters & Butchers Workmen of North America, 393 F.2d 727 (7th Cir. 1968); A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2d Cir. 1967); Commerce Reporting Co. v. Puretec, Inc., 290 F.Supp. 715 (S.D.N.Y. 1968). Indeed, as the Court noted in Manor Drug, "A contract to purchase or sell securities is expressly defined by §3(a) of the 1934 Act . . . as a purchase or sale of securities for the purposes of that Act." Id. at 4715.

There appears to be no dispute in this case that plaintiffs did not actually purchase or sell the securities in relation to which misrepresentations are alleged to have

occurred. However, the defendants have failed to demonstrate the absence of any genuine issue for trial as to the material fact of whether plaintiffs did or did not have a contract for sale sufficient to bring them within the purchaser or seller requirement as it has been interpreted. The motion for summary judgment is therefore denied as to the plaintiffs' federal claims. Should the absence of jurisdictional facts appear during the course of trial or thereafter, the Court can dispose of the case in an appropriate manner at that time.

As the federal claims in this action have been retained for trial, the Court has a jurisdictional basis for retaining the plaintiffs' pendent claims as well. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). As to the claim, raised by the defendants for the first time at this late date, months after the completion of discovery, that the state law claims are not properly pendent to the federal claims in that they do not arise from the same nucleus of operative facts, the Court cannot conclude that the defendants' moving papers conclusively demonstrate this point. Should it appear, during the course of trial, that these claims are not properly before the Court, the Court is not without power to remedy the situation and dispose of them appropriately. United Mine Workers v. Gibbs, supra at 726-27 (1966).

The motion to dismiss the fourth cause of action as to the defendants Youngblood and Trans-Industries, on the ground that in personam jurisdiction was not properly obtained with respect to these claims, is likewise denied. See Altman v. Deramus, 342 F.Supp. 72, 75 (S.D.N.Y. 1972); Sprayregen v. Livingston Oil Co., 295 F.Supp. 1376 (S.D.N.Y. 1968); Kane v. Central American Mining & Oil, Inc., 235 F.Supp. 559, 565-68 (S.D.N.Y. 1964); Cooper v. North Jersey Trust Co. of Ridgewood, N.J., 226 F.Supp. 972 (S.D.N.Y. 1964) citing Schwartz v. Easton, 264 F.2d 195 (2d Cir. 1959).

The defendants' motion for summary judgment and for dismissal of the complaint is denied in all respects.

SO ORDERED.

Dated: New York, New York
November 3, 1975

LAWRENCE W. PIERCE
U. S. D. J.

Leonard DESSER et al., Plaintiffs,

v.

Roy A. ASHTON et al., Defendants.

No. 69 Civ. 1767.

United States District Court,
S. D. New York.

Nov. 7, 1975.

PIERCE, District Judge.

OPINION

As this action goes to trial it contains three claims. The first is based on federal securities law, specifically, on Section 10(b) of the 1934 Exchange Act and Rule 10b-5. The second and third are state law claims brought in this court

pursuant to the doctrine of pendent jurisdiction. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

The federal cause of action is based primarily on allegations of fraud in connection with an alleged oral agreement between defendant Ashton and the plaintiffs for the purchase by the plaintiffs of certain securities. It is undisputed that no purchase or sale of securities actually took place.

The pre-trial briefs of the parties raised, but discussed only briefly, the question of whether or not this alleged oral agreement, even if proved, was a contract for purchase or sale such as would satisfy the "purchaser-seller" requirement in Rule 10b-5 actions. In particular, the question arose as to whether the contract could satisfy the "purchaser-seller" requirement if it was not an enforceable contract under the applicable law including the statute of frauds. Earlier complaints in this action, were twice dismissed on other grounds without specific consideration of this question.

[1] In this action, were the federal claims to fall *prior to trial*, the pendent claims would also be dismissed. See *United Mine Workers v. Gibbs, supra*, at 726-27, 86 S.Ct. 1130; *Kavit v. A.L. Stamm & Co.*, 491 F.2d 1176 (2d Cir. 1974). This result would prevent unnecessary decisions of state law by this federal court. Therefore on November 5, 1975, in consideration of these factors, the Court vacated its earlier denial of the defendants' motion for summary judgment, adjourned the trial of the action and directed the parties to brief the issues regarding the sufficiency of the oral contract to support a private action under Rule 10b-5 where no actual purchase or sale took place.

[2] The Court has considered the submissions of the parties, and conducted its own survey of the applicable law. Based on this review of the law, the Court concludes that an action under Section 10(b) and Rule 10b-5, which relies on a contract for the purchase or sale of securities to satisfy the "purchaser-seller" jurisdictional requirement of the Act, is not deficient as a matter of law simply because the contract relied on for the purposes of satisfying this requirement is oral rather than written. In particular, neither the Court nor the parties have found any authority directly supporting the proposition that a contract must satisfy the statute of frauds in order to support a 10b-5 action.

The requirement that a plaintiff be either a purchaser or seller of securities in order to bring a private action under Section 10(b) and Rule 10b-5 has recently received the imprimatur of the Supreme Court. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539, 43 U.S.L.W. 4707 (U.S. June 9, 1975). However, the Court did not purport to overrule, in fact it specifically recognized the established interpretation of the requirement to the effect that a contract for the purchase or sale of securities will satisfy this requirement. *Id.* at 748, 95 S.Ct. at 1931, 44 L.Ed.2d at 556, 43 U.S.L.W. at 4715.

The Court in *Manor Drug* did not have occasion to discuss the type of contract which must exist in order to meet the "purchaser-seller" requirement. Surprisingly, the efforts of the parties and the Court here indicate that there is little case law dealing with this point. The only authority found by the Court directly discussing the issue is a statement by Professor Louis Loss in the 1961 edition of his text on Securities Regulation. He states:

> "If X resorts to a fraudulent device to escape a contractual obligation to buy Y's securities, the device would seem no less unlawful under Rule 10b-5 because the contract later turned out to be unenforceable on account of some illegality on the part of Y. Just as not every breach of contract violates the rule, it is equally true that there can be a violation of the rule, . . . without an enforceable contract." 3 L. Loss, Securities Regulation 1473 n. 102 (2d ed. 1961).

[3] The paucity of case law does not mean that there are no general principles to guide a decision on this question. It is now well settled that the anti-fraud provisions of Rule 10b-5 are to be liberally and flexibly construed so as to further the aim of Congress to protect investors from fraud and maintain a free and open securities market. See *Superintendent of Insurance v. Bankers Life and Cas. Co.*, 404 U.S. 6, 12, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971); *SEC v. Capital Gains Research Bur.*, 375 U.S. 180, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963); *Commerce Reporting Co. v. Puretec, Inc.*, 290 F.Supp. 715 (S.D.N.Y.1968). It has been specifically held that this admonition should apply to the term "contract" as defined in the 1934 Exchange Act; see *Mt. Clemens Industrials, Inc. v. Bell*, 464 F.2d 339 (9th Cir. 1972), and to the "purchaser-seller" requirement. See *Herpich v. Wallace*, 430 F.2d 792 (5th Cir. 1970).

The majority of cases in which a contract to purchase or sell, but not an actual purchase or sale, was present have dealt with the issues raised without discussing the nature of the contract involved, or commenting on the significance of whether it was written or oral. See, e. g., *Walling v. Beverly Enterprises*, 476 F.2d 393 (9th Cir. 1973); *Allico National Corp. v. Amalgamated Meat Cutters & Butchers Workmen of North America*, 397 F.2d 727 (7th Cir. 1968); *A.T.Brod & Co. v. Perlow*, 375 F.2d 393 (2d Cir. 1967). One opinion, however, while not overtly discussing the issue, clearly proceeds throughout on the assumption that an oral contract for the sale of securities, if proved, would satisfy the jurisdictional requirements of Section 10(b). See *Pepsico, Inc. v. W.R. Grace & Co.*, 307 F.Supp. 713, 719 (S.D. N.Y.1969). *Dopp v. Franklin National Bank*, 461 F.2d 873 (2d Cir. 1972) (Kaufman, J.) is not to the contrary. There the Court cited the fact that contracts for the sale of securities are required to be in writing under New York law (U.C.C. § 8 319) as bearing on whether or not a contract existed in that case, but did not suggest that the absence of a contract in writing in that case was jurisdictionally fatal to the plaintiff's claim. In fact, after reversing the granting of a preliminary injunction, the Court of Appeals remanded the case for trial on the merits. *Id.* at 882.

The other cases relied upon by the defendants are likewise not conclusive. While it cannot be gainsaid that the *Manor Drug* opinion contains strong language concerning the dangers of parole evidence in the proof of 10b-5 claims, the context of that language cannot be ignored. There the Supreme Court was discussing the situation where a nonpurchaser of securities alleges not that he had an oral contract to purchase securities but simply that he himself refrained from purchasing due to reliance on an alleged misrepresentation or omission. *Id.* 421 U.S. at 732, 738, 95 S.Ct. at 1924, 1928, 44 L.Ed.2d at 547, 552, 43 U.S.L.W. at 4710, 4713. The hypothetical situation there is clearly distinguishable from the case at bar, at least because of the availability of the testimony of other witnesses to confirm or contradict the oral testimony of the plaintiffs.

Ingenito v. Bermec Corp., 376 F.Supp. 1154 (S.D.N.Y.1974) is probably the most helpful case for the defendants' view of the law. However, even that case stops short of holding that a purchase or sale can *only* arise from a contract when the nature and terms of an investor's involvement are substantially altered by the creation of new rights and obligations. It states, rather, only that certain cases "seem to stand for the proposition" that a purchase or sale will arise in such a situation. *Id.* at 1181.

Ashton v. Thornley Realty Co., 346 F.Supp. 1294 (S.D.N.Y.1972), *affirmed in open court*, 471 F.2d 647 (2d Cir. 1973) deals only with the question of whether there was a contract to purchase for Rule 10b-5 purposes where a document relied upon, *by its own terms*, said that it was subject to the approval by the Board of the corporation involved. *Id.* at 1299. Not surprisingly, the Court held that there was not a contract under those circumstances.

[4] In the absence of any clear authority requiring that a contract to purchase or sell relied upon for jurisdictional purposes under Section 10(b) and Rule 10b-5 must be in writing; and in view of the broad anti-fraud purposes of this section; and, not incidentally, in light of the view of the Court of Appeals for this Circuit with respect to motions for summary judgment, *see, most recently, Heyman v. Commerce and Industry Insurance Co.*, 524 F.2d 1317 (2d Cir. 1975), the Court determines that the appropriate course at this juncture is to proceed with the taking of the evidence in this case. This does not mean, of course, that the Court has made any findings with respect to the merits of the action, particularly, with respect to the question of whether or not there was a contract between the plaintiffs and defendants in this action. It means only that the Court has determined that there are issues to be tried with respect to these matters, and that the Court has jurisdiction over them.

Accordingly, all outstanding dispositive motions of the defendants are hereby denied.

It is so ordered.

* * *

gtpd 6 [59]

we will continue on Monday and a portion of Friday.

MR. COHEN: That creates one problem, which is that one of my witnesses is leaving for Europe at the end of the day on Friday, so I would assume we would take him out of order.

THE COURT: We would take him out of order, yes.

Further, Mr. Shelton, is there a motion by you directed to the Court asking the Court to vacate its ruling on your motion for summary judgment and do you, assuming that is done, renew your motion for summary judgment?

MR. SHELTON: I respectfully shall do, your Honor.

THE COURT: All right.

That means then, Mr. Cohen, that the first part of that is granted. The Court vacates its ruling on the motion for summary judgment and considers the motion for summary judgment to now be outstanding and I will be directing my attention to that motion in light of your submissions.

MR. COHEN: Your Honor, I should like the record to be clear that the motion for summary judgment did not contain a motion to dismiss on the grounds of Statute of Frauds and the Statute of Frauds was not argued in that motion for summary judgment.

THE COURT: You should direct that, Mr. Shelton, if you wish. You make whatever motions to dismiss you deem appropriate. And if you have not addressed the Statute of Frauds question, you might consider whether you wish to do so in your submission.

MR. SHELTON: Your Honor, I did do so in my original brief. I made it very clear.

THE COURT: All right. Both sides have dealt with this very scantily, very scantily. Plaintiff has practically not dealt with it, so this becomes an opportunity, Mr. Cohen, for you to address the Statute of Frauds issue.

All right. Thank you.

-oOo-

* * *

jbb

MR. SHELTON: Yes. Your Honor, may I suggest that in view of the fact that we do have a jurisdictional question which is going to depend upon the making of this agreement, that at the present time the testimony ought to be limited to that issue because that is going to -- you know, we will be finished today on that basis, and then your Honor can make a determination.

MR. COHEN: Judge, it would be very difficult to try this case, since it is a non-jury case, it would seem to me that the best method would be --

THE COURT: I have considered the point a couple of times, Mr. Shelton, and I keep coming out with the same result which is while that has some appeal we should really take all the evidence. In terms of judicial economy, is that what we call it, economic usage of judicial time, if I take part of the evidence and make a ruling and I am wrong, I simply get the case back and we have to perhaps proceed from there.

If I take all of the evidence, I am in a very different position, so I think we might as well go ahead and devote the time to it. Take the case, try the case --

MR. SHELTON: Does that mean the damage question also because that is going to be the biggest part of this testimony, I suspect.

* * *

* * *

THE COURT: Are you finished with the inquiry concerning the witness?

MR. COHEN: Yes.

THE COURT: No questions?

MR. SHELTON: No questions.

THE COURT: You request that he be declared an expert in what?

MR. COHEN: In connection with finders and the compensation generally paid to finders, putting deals together.

MR. SHELTON: In finders and putting deals together?

MR.COHEN: That is correct.

MR. SHELTON: Your Honor, can I be heard on this for a moment?

THE COURT: One moment.

MR. SHELTON: There is no issue in this case about finders fees at all,your Honor.

THE COURT: Well, that is the first question that comes to mind, Mr. Cohen.

MR. COHEN: Your Honor, that question, I think, begs the issue here, because among the -- among other things there is a claim for breach of contract by the parties and for tortuously inducing a breach of contract, which is

that original letter of June 20, 1966, and in connection with what damages the Dessers suffered, one of the measures of their damages it is my view, would be what they are reasonably entitled to as a result of what they did.

THE COURT: All right. We won't spend too much time on it. I will take it. If it is -- I will take it.

And the witness is declared to be an expert as requested.

Go ahead.

MR. COHEN: I would like this prospectus of Trans-Industries, Inc., dated January 24, 1969, marked for identification.

(Plaintiffs' Exhibit 2 was marked for identification.)

Q Mr. Haidas, is there any custom or practice in the private placement business concerning the amount of fees to be paid a finder?

MR. SHELTON: Objection, your Honor.

THE COURT: Yes. More specifically, Mr. Shelton?

MR. SHELTON: I just don't think, your Honor, that we have any showing at all that there is any finders fee in connection with this particular case.

THE COURT: Overruled.

Go ahead.

* * *

exception.

MR. COHEN: I would liek to say Mr. Ashton testified at deposition there was an agreement in principle to acquire Transign at 65 and 35.

THE COURT: I am aware of that. We have testimony in abundance about the 65, 35, and so on and so forth. There are a variety of reasons which I probably will put in writing. In other words, I grant the motion, opinion to follow, with respect to the dismissal of the first cause of action.

Now, let us proceed. The Court in its discretion is going to continue trial with reference to the third and fourth causes of action. The Court has discretion once the federal claim falls, if it does fall, to dismiss the pending claims in this court. I am not going to do that because I don't think it makes a lot of sense to have this case go across the street to another court and start all over again, if you can still do that, so let's proceed to dispose of the trial with reference to Counts 3 and 4.

MR. SHELTON: Your Honor, so the record may be complete, and I know that your Honor has said it is a question of discretion, I suggest to your Honor that I would like to move to dismiss the pending claims and I take it your

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Leonard Desser, et al.

vs.

Roy A. Ashton, et al.

69 Civ 1767

New YOrk, New York
November 12, 1975
3:00 p.m.

(Trial resumed.)

THE COURT: Good afternoon.

Let's see, we are proceeding with the third and fourth counts.

Call your next witness, please.

MR. COHEN: Judge, before I call my next witness, after giving some reflection to your decision and your ruling yesterday afternoon, I was unclear as to the reason that the Court dismissed the first cause of action, the federal security claim.

THE COURT: I did not find agreement such as I believe to be contemplated by the federal statutes and rules and I did not find fraud in connection with the agreement that you would have had me find did exist.

An opinion will follow.

MR. COHEN: May I just pursue this for a moment, Judge?

* * *

MR. SHELTON: Defendant rests, your Honor.

THE COURT: The plaintiff rests on the entire case, that is as to liability.

MR. COHEN: That's right.

THE COURT: And the defendant rests on the entire case as to liability.

MR. SHELTON: As to liability, that is correct. Not to anything further.

MR. COHEN: Your Honor, at this time I move to conform the pleading to the proof to the extent that is required by the Federal Rule of Procedure. I would like to be able to argue that in our post trial brief or memorandum, assuming your Honor wishes it.

THE COURT: I think that I better do is wait to see that submission. The motion is granted liaberally, but I want to be sure of what I am granting before I --

MR. SHELTON: Before your Honor grants the motion, could we at least know what it is?

THE COURT: We will see when we get it in writing.

MR. SHELTON: I assume your Honor is not going to act on that today.

THE COURT: That is correct. So in effect

Roy Ashton

June 20, 1966

Dear Sirs:

You have indicated to the undersigned and his agents Ted Donson and Tom Davidson that you are in possession of information in regard to a particular manufacturing company (The Company) and that you wish to have the undersigned finance the acquisition of the Company by you on terms and conditions mutually agreeable to you and the undersigned.

In order to induce you to make known to the undersigned certain confidential information in regard to the Company the undersigned hereby agrees with you as follows:

1. The undersigned will not attempt to acquire the Company or deal with the Company in any manner either personally or in any of his corporate capacities, except on terms and conditions acceptable to you in your sole discretion; and
2. The undersigned will not reveal any information about the Company received by or through you to anyone, except with your express permission.

If the foregoing is acceptable to you, kindly indicate your assent thereto by signing in the space provided for on the enclosed copy of this letter. In order to properly identify the Company, kindly set out the name and the principal office of the Company in the space provided for on the enclosed copy of this letter.

Very truly yours,

Roy A. Ashton

Roy Ashton

RA:jb

Leonard and Melvin Desser
Jacob S. Landesman
249 East 48th Street
New York, New York

10 a.m. — 8/31/65 Tues.

Mr. James H. Youngblood
601 Orchard Ridge, Bloomfield Hills, Michigan 48013

August 10, 1965

Gentlemen:

I am the sole owner of a corporation located near Detroit. Our product is patented (12 years remaining) and is O.E.M. with every manufacturer in our field in North America. We are seven years old and our sales volume has risen steadily in annual increments of 20% or better. We have developed two new products this year (patents applied for) that have an easy potential for doubling our current sales. We have competent management that will stay and our facilities and equipment are the finest and no capital outlay should be required for the next few years.

(2)

Mr. James H. Youngblood
601 Orchard Ridge, Bloomfield Hills, Michigan 48013

This corporation has never been offered for sale before this letter. Last year our pretax profits exceeded $500,000.00 and in our first six months of this year, we have a pretax profit of $330,000.00

We would ask approximately $2,000,000.00 for this property with no real estate involved in the transaction.

If you are interested, I would be happy to discuss this proposal in person and in detail with your qualified representation, at your convenience.

Very truly yours,

Raymond Hood

Telephone: Area Code 313 - 644-6716

James H. Youngblood
601 Orchard Ridge
Bloomfield Hills, Mich 48013

July , 1966

James H Youngblood, Esq.
Detroit, Michigan

Dear Mr. Youngblood:

Confirming the understanding reached in our recent conversations, British-American Insurance Company, Limited and Leonard Desser (the Buyers) have agreed to purchase through a corporation organized for such purpose the business and substantially all the assets of (the Seller) for a total purchase price of $.

That understanding is subject to the following conditions:

(1) The Buyers' attorneys, accountants and other representatives shall have immediate access to all relevant contracts, business records and other data and documents of the Seller to verify and update the information you have made available to them, and the Seller's officers, accountants and attorneys will cooperate fully with them for the purpose of fully informing the Buyers as to the Seller's business, earnings, financial condition and prospects. The

Buyers must be satisfied that the results of such investigation by its attorneys, accountants and other representatives substantially confirm the information you have made available to them.

(2) All requisite corporate action shall be promptly taken to approve the terms of the understanding and to authorize the transaction, including approval by the Board of Directors of the Seller and British-American Insurance Company and by you as the sole shareholder of the Seller.

(3) As promptly as possible, the Buyers and the Seller shall sign and deliver a formal purchase agreement setting forth in terms and in form satisfactory to the attorneys for both parties the detailed terms and conditions of the transaction, including without limitation the following:

(i) customary and adequate representations and warranties of the Seller as to its financial statements, income tax returns, litigation, taxes, title to property, long-term leases and contracts, employment agreements and other compensation arrangements, patents, trademarks, copyrights, and such other items as may bear upon the value of the business and assets of the Seller to be transferred,

such representations and warranties to survive the closing and to be personally guaranteed by you;

(ii) if deemed necessary by the Buyers, a mutually satisfactory provision protecting the acquiring corporation against liabilities and obligations of the Seller and its subsidiaries which have not been disclosed to the Buyers or are unknown at the closing date;

(iii) appropriate provisions for the termination of the agreement in the event of the institution or threat of litigation or administrative proceedings which would have a materially adverse effect on the Buyers or the Seller or upon the validity of the transaction hereby contemplated; and

(iv) agreement by you, as President of the Seller that you will, after consummation of the transaction, become an employee of the acquiring corporation for a salary of $ per year and will not engage in any activities competitive with the business of the Seller, and that you will use your best efforts to obtain employment agreements from such other key employees of the Seller as shall be designated by the Buyers.

(4) The Seller's business shall continue to be carried out in ordinary and regular course, without the making of any distribution to shareholders, incurring of additional debt or the making of any unusual commitment.

The Seller and the Buyers shall each be responsible for their own fees and expenses incurred in connection with the negotiation of the understanding described herein and the consummation of the proposed transaction.

Please confirm your approval and acceptance of the foregoing by signing at the place indicated below.

Very truly yours,

BRITISH-AMERICAN INSURANCE COMPANY, LIMITED,

by

_____
Roy Ashton
Vice President

LEONARD DESSER,

_____

Confirmed:

by

_____
James Youngblood
President

PLAINTIFFS' EXHIBIT 6

AGREEMENT dated as of August 31, 1966, by and among BRITISH-AMERICAN INSURANCE COMPANY, LTD. of Nassau, Bahamas (hereinafter called BRITISH-AMERICAN) and LEONARD DESSER, MELVIN DESSER and JACOB S. LANDESMAN (hereinafter collectively called the Finders).

WHEREAS BRITISH-AMERICAN desires to acquire, either itself or through an affiliate, substantially all the assets of TRANSIGN, INC. or a controlling interest in the capital stock of TRANSIGN, INC. (hereinafter called the Acquisition), and the Finders have arranged for negotiations between the representatives of TRANSIGN, INC. and Roy A. Ashton, Vice President of BRITISH-AMERICAN, looking toward the Acquisition;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants hereinafter set forth, the parties hereto agree as follows:

1. In consideration of the releases in paragraph "2" below and the conditions in paragraph "4" below, BRITISH-AMERICAN will pay to the Finders, a commission in the aggregate amount of $100,000 by bank check payable to Desser Associates, 3611 Woodvalley Drive, Baltimore, Maryland, which Finders acknowledge shall constitute payment in full to them, upon consummation of the Acquisition,

if the Acquisition takes place, but not in any event before January 4, 1967. Finders shall also receive a copy of all closing documents, which Finders agree to keep confidential. BRITISH-AMERICAN shall keep Finders informed as to progress toward the Acquisition and will give written notice to Finders immediately upon consummation of the Acquisition.

2. In consideration of the agreement by BRITISH-AMERICAN in paragraphs "1" and "3", the Finders hereby cancel, nullify, waive and release any right, claim, action or cause of action whatsoever which the Finders or any of them ever had, now have, or may have against TRANSIGN, Inc. or BRITISH-AMERICAN or any of their stockholders, affiliates, directors, officers or agents in respect of the Acquisition, and the Finders hereby release and discharge TRANSIGN, Inc. and BRITISH-AMERICAN and their stockholders, affiliates, directors, officers and agents from any obligations that may be due and owing by them or any of them to the Finders in respect of such a transaction.

3. BRITISH-AMERICAN further agrees to indemnify and save harmless Finders against any and all claims, demands, suits or causes of action, including all costs, expenses, and attorneys fees incurred in defense of same, made or brought by Thomas M. Davidson and/or Theodore Donson,

having an office at One Chase Manhattan Plaza, New York City, on account of finders fees or any other matters in connection with the Acquisition.

4. This Agreement hereby supersedes and renders null and void any prior understanding, whether oral or written, express or implied, between the Finders or any of them and TRANSIGN, Inc. or BRITISH-AMERICAN or their stockholders, affiliates, directors, officers or agents, including without limitation the terms and conditions contained in or relating to a certain letter dated June 20, 1966, signed by Roy A. Ashton and addressed to the Finders. No modification or amendment of this Agreement or any other agreement relating to the subject matter of this Agreement shall be effective or valid for any purpose unless reduced to writing and signed by the parties to be charged thereby.

5. In the event the Acquisition is not consummated this Agreement is null and void.

6. This Agreement shall be governed by the laws of the State of New York.

FINDERS:

Leonard S. Desser August 31 ~~September~~, 1966.
LEONARD DESSER

Melvin M. Desser August 31 ~~September~~, 1966
MELVIN DESSER
by Leonard S. Desser

Jacob S. Landesman August 31 ~~September~~, 1966.
JACOB S. LANDESMAN

BRITISH-AMERICAN INSURANCE COMPANY, LTD.,

by Roy A. Aalto August 31 ~~September~~, 196
Authorized Signature
Vice President

MANAGEMENT

The directors and officers of the Company are as follows:

Name	Office
James D. Bond	Chairman of the Board, President and Director
Jane Strenciwilk	Comptroller, Treasurer and Assistant Secretary
Robert J. Ruben	Secretary
Roy A. Ashton	Director
Dale S. Coenen	Director
Duncan Miller	Director
James H. Youngblood	Director

James D. Bond has been Chairman of the Board, President and chief executive officer of the Company since October, 1968. From March, 1968 to October, 1968 he engaged in personal business investing. From March, 1963 to February, 1968 he was Vice-President of Harry and David (an Oregon corporation), with responsibilities for marketing and corp[illegible]velopment, including acquisitions and mergers. Prior thereto he was associated with Booz, Al[illegible] Hamilton, a management consulting firm, and with Ekco Products, Inc., as President of a subsidiary corporation.

Mr. Roy A. Ashton served as Chairman of the Board and chief executive officer of the Company from September, 1967 to October, 1968. He is currently engaged in personal business investing. From January, 1964 to April, 1966 he was a Senior Associate in Corporate Finance for Laird and Company Corporation, investment bankers in New York City. From April, 1966 to February, 1967 he was vice-president of British American International Ltd., a private investment banking company, and between February, 1967 and September, 1967, was in private investment counseling.

James A. Youngblood has been a director of the Company since September, 1967, and is currently engaged in personal business investing. Mr. Youngblood served as President and chief operating officer of the Company from September, 1967 to October, 1968. Prior thereto and since 1960, he was President and sole shareholder of Transign. [See "Interest of Management in Certain Transactions".]

Dale S. Coenen has been a director of the Company since September, 1967. Prior to November 1963 and until August 1967 he was Vice-President of Laird and Company Corporation, investment bankers. Since August, 1967 he has been President of Coenen & Co., Inc. [See "Interest of Management in Certain Transactions" and "Underwriting".]

Duncan Miller has been a director of the Company since September, 1967. Prior to 1963 and until September 1964 he was a Senior Vice-President of Laird and Company Corporation. He is currently President of the Donner Corporation, an investment advisor, and has occupied such position since September, 1964.

Robert J. Ruben is a member of the firm of Shea Gallop Climenko & Gould, general counsel to the Company. He has been a member of such firm since 1960. He was elected Secretary of the Company on December 26, 1967.

Jane Strenciwilk has been Comptroller and Assistant Secretary of the Company since February, 1968 and Treasurer since October, 1968. Prior thereto she was with Lawrence Scudder & Co., Certified Public Accountants, Detroit, Michigan, from 1952 to 1968, as a Certified Public Accountant.

Remuneration of Directors and Officers

The following table contains information about the remuneration received during the year ending December 31, 1968, from the Company by the only directors and officers whose remuneration for such year exceeded $30,000 and by all directors and officers of the Company as a group:

Name of Individual or Identity of Group	Capacity in Which Remuneration is to be received	Total Remuneration
Roy A. Ashton	Officer and Director(1)	$ 48,000
James Youngblood	Officer and Director(2)	36,000
All Directors and Officers as a Group (3 in number)	Officers	106,817(3)

(1) Including January 1, to October 15, 1968, during which time Mr. Ashton served as Chairman of the Board and chief executive officer, and the period from October 15, to December 31, 1968 during which time Mr. Ashton served as financial consultant to the Company.

(2) Represents remuneration received by Mr. Youngblood through September 30, 1968 under a $48,000 per annum employment contract which was terminated at such date. At such time he resigned as President of the Company effective October 15, 1968.

(3) Includes approximately $10,417 paid to Mr. Bond as Chairman of the Board and President of the Company from October 15, 1968 to December 31, 1968. Mr. Bond's annual salary for 1969 will be $50,000. Does not include $36,500 in legal fees paid or accrued to Shea, Gallop, Clinenko & Gould, a firm of which Robert J. Ruben, Secretary of the Company, is a partner, for the period from September 1, 1967 to December 31, 1968.

Principal Stockholders

The following table sets forth information concerning the ownership of Common Stock of the Company as of January 10, 1969 by the only persons who own of record or are known by the Company to own beneficially more than ten percent of such stock, and by all directors and officers of the Company as a group:

Name and Address	Type of Ownership	Owned Amount	Percent of Class
James D. Bond 231 Waddington Rd. Birmingham, Michigan	Of Record and Beneficially	326,854	30.2
James Youngblood 601 Orchard Ridge Rd. Bloomfield Hills, Mich.	Of Record and Beneficially	200,000	18.4
Dale S. Coenen 720 Ponus Ridge Rd. New Canaan, Conn.	Of Record and Beneficially	171,680	15.9
Duncan Miller 324 E. 69th Street New York, N. Y.	Of Record and Beneficially	171,400	15.8
Officers and Directors as a Group	Of Record and Beneficially	949,504	87.7

After the sale of the shares offered hereby, the directors and officers of the Company as a group will own 60% of the outstanding Common Stock. The directors and officers of the Company as a group also own 3,750 shares of the Company's Non-Cumulative Convertible Preferred Stock, representing approximately 91% of the outstanding shares, which shares are convertible into an aggregate of 88,000 shares of Common Stock. On January 10, 1969 Mr. Bond purchased for investment an aggregate of 326,854 shares of the Company's Common Stock from Messrs. Ashton, Miller and Coenen. Mr. Bond has granted Mr. Ashton an option to repurchase 40,000 of such shares at prices substantially in excess of the public offering price.

Interest of Management in Certain Transactions

In September 1967, Messrs. Roy A. Ashton, Dale S. Coenen and Duncan Miller purchased 800,000 shares of Common Stock (as adjusted for a subsequent stock split) from the Company for a total consideration of $100,000. Messrs. Ashton, Coenen and Miller also purchased from the Company a total of 3,750 shares of Non-Cumulative Convertible Preferred Stock for $375,000, and purchased a total of $500,000 principal amount of the Company's 5½% Subordinated Debentures at face value. On July 25, 1968, Messrs. Ashton, Miller and Coenen purchased additional 5½% Subordinated Debentures from the Company in amounts of $40,000, $40,000 and $80,000, respectively, at the face value thereof. Such Debentures provide that they will be prepaid out of the proceeds of any public offering of Common Stock of the Company. The holders of all of the outstanding $715,000 principal amount of such Debentures have agreed to waive prepayment out of the proceeds of this public offering.

On September 28, 1967, the Company purchased all of the outstanding stock of Transign, Inc. from James Youngblood in an arm's length transaction for $850,000 cash, and $900,000 in notes which were paid in January 1968. The Company also purchased from Mr. Youngblood a patent relating to the bus destination signs, the major product of Transign, Inc., for $1,400,000, by delivering two promissory notes of $750,000 and $650,000, payable January 2, 1969 and January 2, 1971, respectively. Mr. Youngblood has agreed to extend the payment date on a $350,000 portion of the $750,000 note until the completion of this offering and the remaining $400,000 portion until April 1, 1969. On September 14, 1967, Mr. Youngblood purchased 200,000 shares of Common Stock (as adjusted for a subsequent stock split) from the Company for $25,000. Mr. Youngblood also is a guarantor in the amount of $400,000 of bank loans of the Company with First National City Bank.

Mr. Youngblood and a family Trust are the owners of the land and building upon which is located the operating plant of Transign, Inc. Transign, Inc. has leased such property from the Trust and Mr. Youngblood until December 31, 1974, and pays an annual rental of $36,000. The Company has an option to buy the land and buildings at any time during the terms of the lease for a total price of $400,000.

Mr. Youngblood has offered to purchase the business of Trans Tube from the Company. The Board of Directors is considering this offer and has engaged the services of independent appraisers to assist it in evaluating the proposal.

Mr. Dale S. Coenen, a director of the Company, is also the president and major shareholder of Coenen & Co., Inc., representative of the Underwriters herein. For a description of the terms of the underwriting, see the cover page of this Prospectus and "Underwriting".

Coenen & Co., Inc. is a lessee under a Lease Agreement dated March 1, 1968, between Sigmund Sommer, Landlord, and Coenen & Co., Inc., Tenant, of the 17th Floor of 280 Park Avenue, New York, New York. The annual rental under said lease is $133,000. The Company guaranteed the obligation of Coenen & Co., Inc. under the lease agreement in consideration of a sublease from Coenen & Co., Inc. to the Company of a certain portion of such premises and an agreement to share equally in any profit that may arise from subleasing any portion of the space in such premises not utilized by the either Coenen & Co., Inc. or subleased to the Company. Subsequently, the Company agreed with Coenen & Co., Inc. that it will not utilize any portion of such premises subleased from Coenen & Co., Inc., and the Company intends to further sublease the subleased premises to another tenant.

DEFENDANTS' EXHIBIT A

PHONE-OFFICE-2-3374
HOME - 5044

ROY A. ASHTON
VICE-PRESIDENT
SECURITIES AND INVESTMENTS

BRITISH-AMERICAN INSURANCE CO., LTD.
P. O. BOX 68
NASSAU, BAHAMAS

DEFENDANTS' EXHIBIT F

TAX EXEMPT FOUNDATION

Will purchase private and closely held companies with pretax earnings of $200,000 and up. All negotiations conducted on a strictly confidential basis. Quick action assured. This is our first and only advertisement.

Box D-881, The Wall Street Journal

(Typed Copy of Defendants' Exhibit F)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

LEONARD DESSER, MELVIN DESSER and JACOB S. LANDESMAN,

Plaintiffs, : 69 Civ. 1767

- against -

ROY A. ASHTON, JAMES YOUNGBLOOD and TRANS-INDUSTRIES, INC.,

Defendants.

- X

APPEARANCES:

ROBERT STEPHAN COHEN, ESQ.
SOL V. SLOTNIK, ESQ.
LANS FEINBERG & COHEN
555 Madison Avenue
New York, New York 10022

Attorneys for Plaintiffs

MARTIN I. SHELTON, ESQ.
JOSEPH FERRARO, ESQ.
SHEA GOULD CLIMENKO KRAMER & CASEY
330 Madison Avenue
New York, New York 10017

Attorneys for Defendants

LAWRENCE W. PIERCE, D.J.

OPINION

This civil action concerns events which occurred between August 1965 and September 1967 in connection with

the efforts of defendant James Youngblood (Youngblood) to dispose of Transign, Inc. (Transign), a company owned by Youngblood, and the efforts of the plaintiffs, Melvin Desser, Leonard Desser (referred to together as the Dessers and individually by their full names) and Jacob Landesman (Landesman) to acquire Transign. In connection with those events, which led ultimately to the acquisition of Transign, not by the plaintiffs, but by the defendant Trans-Industries, Inc. (Trans-Industries), a corporation in which the defendant Roy A. Ashton (Ashton) and Youngblood had an interest, the plaintiffs have charged the defendants in this action with violation of the federal securities laws and, in certain pendent claims, with breach of contract and inducing breach of contract.

In defense of the action, the defendants assert, inter alia, that the contract which Ashton is alleged to have breached, at the instance of Youngblood and Trans-Industries, was itself induced by fraud on the part of the plaintiffs. In fact, the record in this case is replete with allegations of fraud, misstatement, double-dealing and deception on the part of virtually every principal involved with these events. Not surprisingly, there in also a good deal of conflicting testimony as to just what occurred and what was said during the course of the negotiations at

issue. Resolving these conflicts where necessary for the decision of this case, the Court finds the facts with respect to the issues of liability in the case[1/] to be as follows:

On August 9, 1965, the Dessers placed an advertisement in the Wall Street Journal in which they stated that a "Tax Exempt Foundation" was interested in purchasing businesses with pretax earnings of $200,000 and up.[2/] The advertisement assured "quick action" and stated that all negotiations would be "conducted on a strictly confidential basis."

Youngblood responded to the advertisement with a letter dated August 10, 1965 in which he stated that he owned a company which fitted the description in the ad and which he was willing to sell for "approximately $2,000,000". He did not otherwise identify the company or its product, but stated that he would be happy to discuss the proposal in detail with the "qualified representative" of the person placing the advertisement.

Upon receipt of Youngblood's letter, Melvin Desser contacted Youngblood to discuss the possibility of meeting to discuss acquisition of the company. Eventually, in the Spring of 1966, at least one, and perhaps two meetings

took place between Melvin Desser (or the Dessers together) and Youngblood.

The testimony of the Dessers and Youngblood is in conflict with respect to the number of meetings which were held and the extent of the discussions which took place. It is clear to the Court, however, that a number of things resulted from the early meeting or meetings.

The possibility that Transign would be purchased by a Texas Archdiocese of the Catholic Church, the "Foundation" which the Dessers had stated they represented, was quickly set aside, when it became apparent that the church was interested in a long payout while Youngblood wanted cash. The discussion then turned to the possibility of the Dessers themselves acquiring the company. Melvin Desser represented to Youngblood that the Dessers had ample funds to enable them to purchase the company for their own account; Youngblood in turn told Melvin Desser that he would be interested in selling the company to the Dessers if they could raise the money. However, Youngblood did not give the Dessers permission to "shop" the company around for additional funding. He specifically cautioned them not to do so and relied on their representation both in their original advertisement and in person that the deal would be handled in strict confidentiality.

Thus, at the time the initial contact between the Dessers and Youngblood was concluded, no agreement or deal had been reached. It was, however, as a result of these early discussions that Youngblood later agreed to meet with the Dessers in July 1966 to further pursue the prospect of the Dessers acquiring the company.

After this early meeting with Youngblood, the Dessers made several attempts to obtain funding for the Transign acquisition. One of the persons to whom Leonard Desser spoke with respect to the deal was plaintiff Jacob S. Landesman, then an attorney associated with the law firm of Cravath Swaine & Moore (Cravath). Desser gave Landesman certain financial information about the company, but he did not reveal either its name or its product line. Landesman, in turn, conveyed the information to two other Cravath attorneys, Thomas Davidson (Davidson) and Theodore Donson (Donson), who indicated to Landesman that a corporation named British-American Insurance Company, Ltd. (British-American) might be interested in the acquisition.

A meeting was arranged through Davidson and Donson for June 20, 1966 at which the Dessers and Landesman were to be introduced to Roy Ashton, then a Vice-president in charge of acquisitions for British-American. Prior to this

meeting, both Landesman and Leonard Desser informed Davidson and Donson that the Transign acquisition was the Dessers' situation, that they had negotiated the purchase of the company, and that they were seeking financing for the deal.

The principal event with which this lawsuit is now concerned occurred at this June 20, 1966 meeting, attended by the Dessers, Landesman, Ashton, Davidson, and Donson. During the course of the meeting Ashton signed an agreement (the June 20 Agreement), which had been prepared by Landesman. In this agreement, Ashton represented that in order to induce the Dessers to make known to him certain confidential information regarding an undisclosed company as to which the Dessers were seeking financing for an acquisition, Ashton would agree (1) not to attempt to acquire or deal with the company in a personal or corporation capacity except on terms acceptable to the plaintiffs, and (2) not to reveal any information about the company received from the Dessers without the permission of the Dessers. It is this agreement which Ashton is charged with having breached, allegedly at the inducement of Youngblood and Trans-Industries.

There is some disagreement as to just what was said and what representations were made by the plaintiffs

at this meeting. Ashton testified that Melvin Desser told him that the plaintiffs had a deal which could only be made on terms acceptable to them and that "they were to be considered principals at all times" (Tr. 640).[3/] Davidson testified, through his deposition, that "the flavor" of the meeting was that the Dessers were "the spokesmen for the company", that "the implication" was that no one could deal with the company but through the Dessers, and that "the implication was sort of that they had a veto power on any kind of a deal" (Tr. 843-44).

Based in substantial part on this testimony and the inferences they would have drawn from it, the defendants argue that the plaintiffs, and particularly the Dessers, induced Ashton to sign the June 20 Agreement by means of fraudulent representations with respect to their authority to deal on behalf of Transign. Therefore, argue the defendants, the agreement was invalid and cannot be the basis for any action against any of the defendants. However, viewing the evidence as a whole, the Court is unable to agree with the defendants' contention that what occurred at that meeting amounted to a fraud on Ashton to induce him to sign the June 20 Agreement.

At the June 20 meeting, the Dessers communicated to Ashton that Youngblood was not dealing with anyone else with respect to Transign and that he had not offered the company for sale to anyone else. Later, the Dessers learned that in fact this was not true and that Youngblood had made other offers of the company. But, at the time the Dessers made the statements in question, they were relating nothing more than what Youngblood had told them and there is no evidence that the Dessers knew otherwise at the time. Under the circumstances, such statements cannot be characterized as fraudulent.

The Dessers also stated that they were to be considered as principals in relation to any acquisition of the company. This was in fact their intention. The Court is unable to agree with the defendants' contention that this statement amounted to a representation by the Dessers that they were in fact principals and owners of the company at the time of the meeting. Davidson, presented by the defendants as the only "independent witness" to testify about the meeting, stated that he did not remember whether the plaintiffs represented themselves as "agents or exclusive finders or brokers or principals", but that while it may "have been fuzzy at some point before the meeting whether

or not [the plaintiffs] had any equity interest in the company . . . it was clear, certainly by the time of the meeting that they did not, or at the meeting it was made clear that they did not, if it was doubtful before" (Tr. 548).

The Dessers stated further that they had negotiated a deal to acquire the company and that they were only looking for funding. However, Melvin Desser denied having actually stated that he was the only one through whom a deal could be made for Transign and Davidson also stated that he did not recall that statement as having been made.

In sum, the Court concludes that in the light of how matters were left with Youngblood after the Spring 1966 meeting, the Dessers probably exaggerated their position with respect to the Transign deal when they presented it to Ashton, Davidson, et al. on June 20, 1966, and they breached Youngblood's confidence by making the presentation at all. However, even though they did not have Youngblood's permission to say what they did, most of what they said was true or at least represented a reasonable understanding on their part of what Youngblood had told them. Thus, while the Dessers may have breached Youngblood's confidence, they did not defraud Ashton. They simply made it

clear to Ashton that they had the information he wanted and that he was not going to get it until he signed the June 20 Agreement. Ashton signed, not because the Dessers had defrauded him, but because they had the information he wanted.

After Ashton executed the June 20 Agreement, which was in the form of a letter addressed to the plaintiffs, the Dessers divulged the name of the company and distributed financial and other information about it. Discussions ensued concerning the possibility of an acquisition of Transign by a new company to be formed by British-American and the Dessers. As this Court has interpreted the evidence, and contrary to the contentions of the plaintiffs, no final oral agreement or contract was entered into between these parties at this meeting.[4/] There was an agreement, however, to arrange a trip to Detroit so that Ashton could meet Youngblood and obtain from him more information about Transign.

The Dessers arranged for a meeting to be held in Michigan during July 1966 so that Ashton could visit Transign, see its operation, and talk to Youngblood. The event surrounding that meeting can be summarized in broad strokes.

The Dessers arrived in Detroit on July 25, 1966 for their meeting with Youngblood. The following day

Ashton arrived and the Dessers introduced him to Youngblood. Various discussions took place concerning the acquisition. However, the Dessers did not tell Youngblood that Ashton was from British-American; rather, they led Youngblood to believe that Ashton was a member of the Dessers' organization.[5/] Such behavior is understandable, in view of Youngblood's earlier instructions to the Dessers that they were not to divulge the information he had given them about Transign. Likewise, when Thomas Courtney (Courtney), another employee of British-American and, in effect, Ashton's superior, arrived to participate in the discussions, the Dessers did not tell Youngblood who he was. Youngblood assumed Courtney was also a part of the Desser organization.

After Courtney arrived, a disagreement arose in Youngblood's presence between the Dessers and Ashton and Courtney concerning the terms of the proposed acquisition of Transign by the Dessers and British-American. In particular, Courtney was opposed to the proposals which had been made concerning both the relative stock participations of the Dessers and British-American and the proposed position of Leonard Desser as the head of the company. No resolution was reached as to these issues.

The following day, Youngblood took the Dessers, Ashton, and Courtney for a tour of the plant, after which

the group returned to Youngblood's office. The plaintiffs find Youngblood's testimony that he did not ask Ashton and Courtney questions about their business or determine that they worked for British-American or, having failed to do so, that he showed "total strangers" around his plant despite a demonstrated penchant for secrecy to be incredible. The testimony is easily explained, however, by crediting Youngblood's testimony, as the Court does, that he had been led to believe that these men were part of the Desser organization.

After the group returned to Youngblood's office, the quarrel between Leonard Desser and Courtney and Ashton continued while Melvin Desser and Youngblood pursued discussions concerning the company. Finally, by mid-morning, Courtney and Ashton left Transign. The Dessers remained behind for a brief while and then left too.

It was the Dessers' testimony that Youngblood had expressed a willingness by that time to deal with the Dessers alone in the sale of Transign and had in fact said he would sign a letter of intent so stating. However, no deal to that effect had been confirmed at the time the Dessers left. The Dessers also testified that pursuant to this understanding with Youngblood they mailed him a retyped version of a letter of intent which had been prepared

earlier for Youngblood's signature and which Melvin Desser had modified to reflect a purchase by the Dessers alone. It is not contested, however, that Youngblood never signed the letter.

On the evening of July 27, 1966, after the Dessers had left Youngblood and Detroit, Ashton called Youngblood at his home from the Detroit airport. According to the testimony of both Ashton and Youngblood, Ashton informed Youngblood that the deal was not going to go through because of the demands which the Dessers were making. He then stated that the Dessers had been representing themselves as being in control of the deal and had wanted a substantial equity interest in the company, despite the fact that their cash contribution to the deal represented only a relatively small proportion of the purchase price. Youngblood was also informed, for the first time that Ashton was an employee of British-American, not of the Dessers.

Youngblood then invited Ashton to come back to his home for the evening. During the course of their discussions that evening, Youngblood stated that the Dessers were not principals in the deal and that they did not have any exclusive right to deal for the company. He also invited Ashton to consider going ahead with the deal on be-

of British-American without the Dessers. When Ashton left the following morning, it was with the understanding, at least on the part of Youngblood, that Ashton would pursue the acquisition on behalf of British-American. The Court finds that at that time, Youngblood did not yet know of the June 20 Agreement between Ashton and the Dessers.

Within a few days of the July 26 and 27 sessions in Detroit, Melvin Desser called Youngblood twice about the Transign deal. During these conversations, Youngblood told Desser he resented the misrepresentations he now felt the Dessers had made with respect to their position in relation to the Transign deal. Not surprisingly, Melvin Desser contended that Ashton had misrepresented the Dessers' earlier statements. He also stated to Youngblood, in an apparent attempt to counter any advantage Ashton might have gained, that Ashton and British-American were not in a position to deal freely with Youngblood without the Dessers because of the June 20 Agreement.[6/] Youngblood, however, informed Melvin Desser that he did not want anything further to do with the Dessers. A week or two later, when Melvin Desser called Youngblood again, Youngblood informed Desser that he was going ahead with a deal with British-American and that the purchase price would be $2,900,000 rather than the

$2,000,000 which had been discussed previously.

During the month of August 1966, Leonard Desser had at least two conversations with Ashton and, during the second, he agreed in principle that in lieu of participating as principals in the British-American acquisition of Transign, the Dessers would accept a finder's fee of $100,000. A document to that effect, which also purported to supersede all previous arrangements between British-American and the Dessers including the June 20 Agreement, was executed on August 31, 1966.

As matters turned out, the deal with British-American did not go through. Youngblood testified that he became dissatisfied with the inability of British-American to provide certain guarantees for the notes which were to be given to Youngblood. By a letter to British-American dated September 30, 1966 with a copy to the Dessers Youngblood notified British-American that he was terminating all options to purchase Transign. By its terms, the finder's agreement which the Dessers had signed became null and void when the acquisition of Transign by British-American failed to go through.

After the Transign deal collapsed, British-American terminated Ashton's employment. In October 1966,

Ashton was hired by Youngblood as a financial consultant whose chief responsibility was to locate a purchaser for Transign. During the next year Ashton brought a number of potential deals to Youngblood, in one of which he had an interest himself, but none of them was consummated. Finally, in September of 1967, Ashton, together with two other persons with whom he had worked formerly Dale Coenen (Coenen) and Duncan Miller (Miller), offered to purchase Transign from Youngblood through a new corporation they had formed called Trans-Industries, Inc. (Trans-Industries). The deal was approved and Trans-Industries purchased all of the stock of Transign from Youngblood. Youngblood also sold his patent to Trans-Industries. It is undisputed that neither Ashton nor Youngblood notified the Dessers or Landesman of the formation of Trans-Industries and the proposed acquisition by that company of Transign. Nor were the plaintiffs ever offered a chance to participate in the deal. Eventually, through an offering in January 1969, Trans-Industries went public to the considerable profit of both Ashton and Youngblood.

DISCUSSION

The plaintiffs have charged defendants with violation of §10 of the 1934 Securities and Exchange Act,

15 U.S.C. §78(j), and Rule 10b-5 promulgated thereunder. They have also asserted, as pendent claims to this federal cause of action, charges of breach of contract against Ashton and inducing breach of contract against Youngblood and Trans-Industries.

The plaintiffs' 10b-5 claim rests on the allegations that the plaintiffs were fraudulently induced to enter into an agreement with Ashton, who was acting both individually and for British-American, to form a corporation to acquire Transign. Plaintiffs have alleged that this agreement embodied in a proposal that the Dessers and British-American would purchase Transign together with the major portion of the purchase price to come from a loan by British-American. The Dessers were to put up 35 percent of the equity contribution, British-American was to supply the remaining 65 percent, and the stock ownership was to be divided in accordance with the same 35/65 ratio. The plaintiffs have alleged that Ashton entered into this agreement, which they characterized as an agreement for the purchase of securities, with no intention of going through with the deal. Rather, they have alleged his intention was to use this agreement to obtain from the Dessers the information he needed to enable him to approach Youngblood and Transign with a deal of his own. Eventually, the plaintiffs charge, he was successful in

doing so with the aid of Youngblood and Transign who, according to the plaintiffs, thereby adopted and ratified the fraud and became liable to the plaintiffs.

In pretrial motions, the defendants contended that since the plaintiffs had not alleged that any purchase or sale of securities took place in connection with the alleged 35/65 agreement for the purchase of Transign, the plaintiffs had failed to state a cause of action under the federal securities laws in relation to the defendants' alleged fraud. In ruling on these motions this Court concluded, however, that the plaintiffs had alleged fraud by the defendants in connection with an oral contract for the sale of securities and that such an allegation was sufficient to state a cause of action under Section 10(b) and Rule 10b-5. See Desser v. Ashton, 408 F.Supp. 1174 (S.D. N.Y. 1975). The Court therefore allowed the action to proceed to trial on both the federal and the state law pendent claims.

At the trial of the action, at the close of the plaintiffs' evidence with respect to the federal cause of action, the Court heard and granted the defendants' motion to dismiss the federal cause of action pursuant to Rule 41(b), Fed.R.Civ.P.[7/] In doing so, the Court concluded that while an oral contract for the purchase of securities

could be the basis for a 10b-5 action, the plaintiffs had failed to prove their contention that they and Ashton had entered into such a contract for the purchase of securities in connection with the alleged 35/65 agreement for the purchase of Transign.

The Court's conclusion in this regard is supported by the evidence that the parties contemplated a written document to embody the final form of any proposal which would represent a binding contract between the parties for the purchase of Transign. The fact that the proposed 35/65 deal had to be approved by the British-American board of directors before it could become final was further evidence that no contract had been reached. See Ashton v. Thornley Realty Co., 346 F.Supp. 1294 (S.D.N.Y. 1972), affirmed in open court, 471 F.2d 647 (2d Cir. 1973).

As for the plaintiffs' claim that although the 35/65 form of the proposal had to receive the approval of British-American's board nevertheless a binding agreement had been reached between Ashton and the plaintiffs to purchase Transign together on some terms, it weighs heavily against the plaintiffs' theory that such an agreement was reached that no agreement was ever reduced in writing. As the Court of Appeals for this Circuit has noted, "§8-319 of the Uniform Commercial Code provides that

a contract for the sale of securities is not enforceable unless it is in writing or there is a written memorandum by the party against whom it is to be enforced." Dopp v. Franklin National Bank, 461 F.2d 873, 880 (2d Cr. 1972). Adapting the language of that decision, this Court too finds it difficult to believe that the Dessers, obviously experienced investors and knowledgeable in the area of commercial transactions, would not have demanded that such a crucial agreement as the one on which they rely, if there was one, be reduced to writing. See id. The conclusion that no such agreement existed is further bolstered by the fact that the plaintiffs did require that the June 20 Agreement with Ashton be put in writing.[8/]

Having dismissed the plaintiffs' federal claims while the trial was in progress, the Court elected to exercise its discretion to continue to hear and decide the plaintiffs' pendent claims based on state law. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Despite defendants' vigorous arguments, the Court was not persuaded that this case was one in which the plaintiffs had evidenced such apparent bad faith in bringing their federal claims that dismissal of the pendent claims was warranted even after trial had commenced. See Kavit v. A.L.Stamm & Co., 491 F.2d 1176 (2d Cir. 1974). The Court likewise adhered to its pretrial determination that in personam jurisdiction was properly ob-

tained over the defendants Youngblood and Trans-Industries with respect to these claims, despite the fact that these defendants were served extraterritorially. See Altman v. Doramus, 342 F.Supp. 72, 75 (S.D.N.Y. 1972); Sprayregen v. Livingston Oil Co., 295 F.Supp. 1376 (S.D.N.Y. 1968); Kane v. Central American Mining & Oil, Inc., 235 F.Supp. 559, 565-68 (S.D.N.Y. 1964). Accordingly, the Court turns now to discussion and decision of the plaintiffs' claims that Ashton breached the June 20 Agreement, that this breach was induced by Youngblood and Trans-Industries, and that all the defendants are therefore liable to the plaintiffs in damages.

The defendant Ashton's defense to the claim that he breached the June 20 Agreement with the plaintiffs that in return for information about Transign he would agree not to attempt to acquire Transign except on terms acceptable to the plaintiffs and that he would not reveal information about the company received from the Dessers without permission from them rests on the claim that the June 20 Agreement was invalid. Ashton claims that this is so (1) because the agreement was induced by fraud on the part of the Dessers, (2) because the agreement was without consideration, and (3) because the agreement was an unreasonable restraint of trade and against public policy.

The first of these arguments has been discussed and rejected, supra. The second is also easily answered. Whether or not the Dessers had previously revealed information about Transign to other potential sources of financing, it is quite clear from the testimony at trial and from the terms of the June 20 Agreement itself that at the June 20, 1966 meeting the plaintiffs were in possession of information regarding Transign, an as yet unidentified company, and that they agreed to furnish this information to Ashton, who wanted it, in exchange for Ashton's promises as set forth in the June 20 Agreement. There was no testimony from Ashton or anyone else that Ashton tried to determine before signing the agreement whether the Dessers had revealed the information to anyone else. Further, there was no evidence to indicate that he would not have signed the agreement in order to get the information for himself, even if others had received it previously. A clearer case of consideration for a promise is difficult to imagine.

Ashton's third defense to the plaintiffs' breach of contract claim, i.e., that the June 20 Agreement was an unreasonable restraint of trade, requires more discussion.

Section 340 of the New York General Business Law, commonly known as the Donnally Act, provides in part that:

> "Every contract, agreement, arrangement or combination whereby . . . competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained . . . is hereby declared to be against public policy, illegal and void."

The policy embodied in this section has been described by New York's highest court as "a public policy of the first magnitude." Columbia Gas v. New York State Electric and Gas Corp., 28 N.Y.2d 117, 127, 320 N.Y.S.2d 57, 65, 268 N.E.2d 790 (1971). The policy has been applied to agreements purporting to restrict the freedom of one person to deal with others. See, e.g., Paramount Pad Co. v. Baumrind, 4 N.Y.2d 393, 175 N.Y.S.2d 809, 151 N.E.2d 609 (1958); Laride Corp. v. Crusader Manufacturing Co., 4 M.2d 231, 155 N.Y.S.2d 715 (Sup. Ct. N.Y. Co. 1956). According to these decisions, in order to be valid, an agreement which restricts the free exercise of any business activity must be both necessary to protect some legitimate interest of the promissee and reasonable in scope.

It is clear from the face of the June 20 Agreement that it purported to restrict Ashton's conduct of his business, both as an individual and as Vice-president of British-American in charge of acquisitions. In particular, it prohibited him, for an unspecified period of time, from making

any approach to Youngblood and Transign without the knowledge and approval of the plaintiffs. The question, therefore, is whether this agreement was justifiable under the criteria set forth, supra. The Court finds that it was.

At the time the plaintiffs entered into the agreement with Ashton, they reasonably believed that they enjoyed a special position with Youngblood with respect to acquiring Transign. This position constituted an interest that they had a legitimate right to seek to protect by exacting the agreement they did from Ashton. In fact, in this Court's view, even if the Dessers had no special relationship with Youngblood and despite the fact, as found by the Court here, that they had approached other parties with the proposed Transign deal, the Dessers still had a right when they approached Ashton to protect whatever opportunity they had to capitalize on the Transign deal and to prevent it from being appropriated by Ashton. In other words, even if plaintiffs were not the exclusive bidders for the deal, they had discovered the possibility of the deal, whereas Ashton had not, and they had a right to try to prevent him from competing with them for the deal, at least by the use of information provided by the plaintiffs themselves.

But, the defendants argue, even if the plaintiffs had some legitimate and protectible interest in acquiring Transign at the time of the June 20 Agreement was reached, that interest had long since passed in September 1967 when Ashton and his associates formed Trans-Industries and effected the acquisition of Transign. Defendants assert that this was so if for no other reason than that by that time, Youngblood had told the Dessers that he was no longer interested in dealing with them at all with respect to Transign. Therefore, defendants conclude, the Dessers could have no interest in acquiring Transign which could be harmed by Ashton's acquisition of the company in September 1967.

This argument, while possessing an initial appeal, fails for two reason upon closer scrutiny. First, this Court does not view Ashton's actions in approaching Youngblood about Transign in July 1966 and in moving to acquire the company through Trans-Industries in September 1967 as separate and distinct events. Rather, in this Court's view, Ashton breached his agreement with the Dessers when he made his initial approach to Youngblood; his acquisition of the company approximately a year later was a part of a continuing course of conduct all directed toward the same final object. Second, even though, as this Court has found, the plaintiffs had no legitimate expectation in

September 1967 -- and could have had none -- that Youngblood would still be willing to sell Transign to them, they still did have a legitimate expectation that Ashton would not deal for Transign on his own in a manner which was unacceptable to them and which deprived them of any remuneration for the information which they had furnished to Ashton. It was to forestall precisely such an eventuality that the June 20 Agreement was drawn in the first place. The Court concludes that the agreement was necessary to protect a legitimate interest of the plaintiffs.

The next question is whether the agreement was reasonable in scope, both as to the activity it prohibited and the time span it covered. As to the first matter, the Court notes that the agreement in no way undertook to prevent Ashton generally from pursuing the business of arranging acquisitions either for himself or British-American. Rather, it sought to prevent him only from dealing with one investment situation relating to one company. Thus, the case can clearly be distinguished from those in which a restraint which prevented one party from dealing at all in a particular line of commerce or a particular industry, either with or without the permission of the other party, was declared to be invalid. See Paramount Pad Co. v. Baumrind, supra; Larido Corp. v. Crusader Manufacturing Co.,

supra. The Court cannot say that the agreement here was "more extensive than the legitimate interests sought to be protected," Paramount Pad Co. v. Baumrind, supra at 396.

As to time, it is apparent that the June 20 Agreement itself sets no time limit on the restrictions it imposes. However, New York law clearly provides that under such circumstances an agreement will not be considered invalid simply because it contains no time limitation; the courts are empowered to construe such agreements so as to make the restraints imposed reasonable and enforce them as such. See, e.g., Karpinski v. Ingrasci, 28 N.Y.2d 45, 320 N.Y.S.2d 1, 268 N.E.2d 751 (1971). In this case, the defendant Ashton commenced the course of conduct leading to breach of the agreement with the plaintiffs within weeks of entering the agreement. That course of conduct was completed little more than one year later when Ashton consummated just the sort of deal the agreement had been intended to prevent. Under all the facts and circumstances of this case, the Court finds that the restrictions imposed on Ashton by the June 20 Agreement were valid throughout this time period. The June 20 Agreement was not void as an unreasonable restraint of trade in violation of New York law. The Court concludes, therefore, that, like the first two,

Ashton's third defense to the plaintiffs' third cause of action for breach of contract must fail. The plaintiffs have carried their burden of proving that Ashton breached a valid contract with the plaintiffs. Whether plaintiffs have also proved that they suffered any damage as a result of such a breach is a question which will be discussed infra.

Just as plaintiffs have charged in their third cause of action that Ashton breached the June 20 Agreement, so they have charged in their fourth cause of action that this breach was induced by Youngblood and Trans-Industries. For the reasons which follow, the Court finds that the plaintiffs have not established their right to recover against either of these defendants based on this charge.

To establish a right to recover as to either defendant on the basis of their claim for inducing breach of contract, plaintiffs must show that there was a valid contract, that the defendant being considered was aware of the contract, and that the defendant being considered, intentionally and without justification, induced a breach of that contract. See Israel v. Wood Dolson Co., 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956). Further, the rule is well established that:

> "In order to be held liable for interference with a contract, the defendant must be shown to have caused the interference. It is not enough that he merely has reaped the advantages of the broken contract after the contracting party has withdrawn from it of his own motion." Prosser, Law of Torts (4th Ed. 1971) § 129 at 934.

As to the first element, i.e., that there was a valid contract in existence, the Court has already found that the June 20 Agreement did constitute a valid contract between the plaintiffs and the defendant Ashton. Whether the remaining elements are also present will be considered as to Youngblood and Trans-Industries.

As to the defendant Youngblood, the Court has found that on the evening of July 27, 1966, when Ashton was visiting at Youngblood's home in Michigan, Youngblood invited Ashton to consider going ahead with the purchase of Transign on behalf of British-American and without the Dessers. The Court has also found that at the time of that invitation, Youngblood did not know of the June 20 Agreement. Thus, this offer cannot be considered, in any respect, as an attempt by Youngblood to induce Ashton to breach the June 20 Agreement.

Later, after the effort by British-American to acquire Transign had failed and after Youngblood had learned

of the June 20 Agreement between Ashton and the plaintiffs, Youngblood hired Ashton as a financial consultant to find a purchaser for Transign. Ashton explored a number of possibilities, none of which proved fruitful. The plaintiffs rely heavily on the fact that at no time did Youngblood inform the Dessers of any of these opportunities or offer them a chance to participate, or insist that Ashton do so. However, as this Court has already found, by September of 1966, before Youngblood hired Ashton, Youngblood had already told the Dessers that he was no longer interested in pursuing any deal regarding Transign with them. And, contrary to what the plaintiffs seem to imply, while Youngblood was aware of the June 20 Agreement, it created absolutely no obligation on Youngblood's part either to include the Dessers in any Transign deal or to see that Ashton did so. Youngblood was never a party to that agreement, and the Dessers simply had no right, vis-a-vis Youngblood to participate in any acquisition of Transign. Thus, the fact that the evidence shows that Youngblood did not require Ashton to apprise the Dessers of the proposed Transign deals which arose while Ashton was working for Youngblood does not provide a basis for concluding that Youngblood induced Ashton to breach his agreement with the Dessers.

Finally, the plaintiffs assert that Youngblood induced a breach of the June 20 Agreement when in September 1967, he joined with Ashton and others in the formation of Trans-Industries as a vehicle for purchasing Transign. The short answer to this claim is that, in the Court's view, the evidence does not support the plaintiffs' view that Youngblood caused any breach of contract by Ashton which was occasioned by this transaction -- as opposed to having reaped the benefits of such a breach if it occurred. In addition, however, the Court notes that on the basis of the evidence in the record, it appears certain that there was no chance that the Dessers would have been permitted to participate in this deal, even if Ashton had desired that they do so, since Youngblood had determined not to deal with them. Further, the evidence shows that Youngblood had been quite eager to sell Transign for almost two years, partly for reasons having to do with his health. Neither he nor Ashton had been successful in producing a buyer for the company and neither had the Dessers. Therefore, in the Court's view, Youngblood was acting reasonably and in furtherance of his own economic and personal interests when he accepted the opportunity to dispose of Transign through Trans-Industries; he was not acting to intentionally

and unjustifiably interfere with any contract rights the Dessers had with respect to Ashton.

Plaintiffs stress that the various proposals for the purchase of Transign which emerged after Youngblood broke off conversations with the Dessers involved considerably more money than the $2,000,000 figure which had been discussed between these parties initially. Specifically, they point out that the purchase price for the British-American acquisition was to have been $2,900,000 and that the eventual Trans-Industries deal brought Youngblood over $3,000,000. Plaintiffs contend that this disparity is a clear indication that Youngblood was motivated to induce Ashton to breach the June 20 Agreement by a desire for greater profit at the expense of the Dessers.

This argument must fail for two reasons. First, as has already been stated, Youngblood had no obligation to deal with the Dessers and he had already decided not to do so. Thus, any profits he made from the sale of Transign to any purchaser were not at the expense of the Dessers. The second is that the evidence shows that both the proposed British-American purchase and the eventual Trans-Industries purchase involved deals which were substantially different in character from that originally proposed by the Dessers.

The Dessers' proposal had been to buy the assets and the patent of the company for $2,000,000; any cash which the company had on hand was not to be a part of the deal. According to Ashton's testimony, British-American also began negotiating with Youngblood concerning a purchase on similar terms, i.e., a $2,000,000 purchase with Youngblood taking cash and certain other assets out of the company. During the course of discussions, however, the proposed structure of the deal changed and eventually British-American offered Youngblood an amount between $2.5 and $2.9 million for a stock purchase including all cash and assets of the company; the price would be increased to account for the value of the cash and assets which would otherwise have been taken out of the company. The eventual Trans-Industries deal was also a stock purchase with the cash and assets of Transign left in the company. The Court also notes that according to Youngblood's testimony, the profits of the company had doubled between 1965 when the Dessers first contacted Youngblood and 1967 when the Trans-Industries deal went through, due in large part to the addition of a new product line. Given all of these factors which differentiate the various deals and the circumstances surrounding them, the Court is unable to conclude that the plaintiffs have established that

Youngblood's motive in eventually going through with the Trans-Industries deal rather than the Dessers' deal was simply that he wanted to receive greater proifts at the Dessers' expense. Nor have the plaintiffs established any liability on the part of Youngblood with respect to their fourth cause of action.

Plaintiffs' fourth cause of action charging Trans-Industries with having induced Ashton to breach the June 20 Agreement has little merit. Ashton breached that agreement when he first approached Youngblood about purchasing Transign without the Dessers. This was in July of 1966, long before anyone had ever thought about Trans-Industries. While it could be argued that the purchase of Transign through Trans-Industries in 1967 was the culmination of the same course of conduct constituting a breach of the agreement, it can hardly be reasonably concluded that the corporation which was formed as a vehicle for implementing the intention to purchase the company was also the cause for that intention being formed. The fact that any knowledge which Ashton or Youngblood had concerning Transign and plans to acquire it might be imputable to Trans-Industries since those men were officers, directors and principal shareholders of that company, can hardly be grounds for imputing to the company intentions and actions

which were formed and taken before the company was brought into existence. The plaintiffs have not established a right to recover against the defendant Trans-Industries based on their fourth cause of action.

With respect to those causes of action which remained after trial, the Court has concluded that the plaintiffs have succeeded in proving that Ashton breached a valid contract with the plaintiffs and that the plaintiffs are entitled to recover for any damages resulting from the breach. Ashton, as well as the other defendants, has argued, however, that even if he should be found liable as to the plaintiffs' pendent claims the plaintiffs cannot possibly show that they suffered any loss as a result of the defendant's actions. Ashton asserts that the fact of damage cannot be established, and, therefore, there can be no recovery by the plaintiffs regardless of any defendant's liability.[9/] This argument is based substantially on the position, which the Court finds to be supported by the facts, that the Dessers were deprived of no opportunity to participate in the ultimate acquisition of Transign by Trans-Industries since Youngblood had long since determined that he was not going to deal with the Dessers in selling his company.

The Court agrees with the factual premise of this argument and agrees that any recovery due the plain-

tiffs should not be measured in terms of participation in the Trans-Industries acquisition of Transign. However, the plaintiffs have asserted in their post-trial arguments and briefs, in connection with a motion pursuant to Rule 15(b), Fed.R.Civ.P. to conform the pleadings to the evidence, that regardless of whether they recover against the defendants on the causes of action stated in their complaint they have a right to recover based on quantum meruit for the services rendered to the defendants. The Court concludes that whether this theory is viewed as a separate cause of action or, more appropriately in the Court's view, as an equitable basis for determining the amoung of damages for plaintiffs' recovery, the plaintiffs are entitled to recover based on this theory, though against the defendant Ashton only.

Rule 15(b), Fed.R.Civ.P., provides that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The Rule provides further that when evidence with respect to issues not within the pleadings is objected to "the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the object-

ing party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits" (emphasis added).

Plaintiffs have moved the Court, post-trial, for leave to amend the pleadings to add a claim in quantum meruit for services rendered by the plaintiffs to the defendants. The defendants were put on notice in the pretrial order filed in this case in May 1974 of plaintiffs' intention to assert this additional claim. While they have objected to such an assertion, they can claim no surprise. Further, the Court of Appeals for this Circuit has stated that,

> "The test for allowing an amendment under Rule 15(b) to conform pleadings to issues impliedly tried is whether the opposing party 'would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.' 3 Moore, Federal Practice ¶ 15.13[2], at 993 (2 ed. 1966; see, e.g., Northern Oil Co., Inc. v. Secony Mobil Oil Co., Inc., 347 F.2d 81 (2d Cir. 1965)." Lomartira v. American Automobile Insurance Co., 371 F.2d 550, 552 (2d Cir. 1967).

Here, as in Lomarita [sic], the defendants have at no time suggested to the Court what additional evidence or preparation they would be denied were the Court to grant the plaintiffs' application. In fact, it appears that pre-

cisely the same evidence which was relevant to the plaintiffs' pleaded claims is relevant to a claim in quantum meruit. Thus, the only question is whether the defendants were fairly warned that this claim was being presented, and the Court holds that they were. The Court finds no prejudice to the defendants and hereby grants the plaintiffs' motion to conform the pleadings to add a claim for recovery in quantum meruit.

Recovery in quantum meruit may be allowed where the evidence shows a rendition of services, for example, by someone performing the functions of a broker, under circumstances evidencing an implied agreement to furnish compensation for the services. See Towers v. Doroshaw, 5 Misc.2d 241, 159 N.Y.S.2d 367 (Sup. Ct. Onond. Co. 1957); Bialostok v. Wolfer, 191 Misc. 385, 77 N.Y.S.2d 222 (Sup. Ct. Kings Co. 1947). See generally 50 N.Y. Jur., Restitution and Implied Contracts §74.

This theory can provide no basis for a recovery by the plaintiffs against Youngblood. Far from asking the plaintiffs to serve as agents or brokers for him, Youngblood specifically told the plaintiffs not to "shop" Transign around to other prospective purchasers. At most, Youngblood impliedly offered the Dessers a chance to buy

Transign for their own account if they raised the necessary funds, which they did not do. Their action in bringing Ashton to Youngblood was in pursuit of their own objective of purchasing the company and could in no way be viewed as performing a service for Youngblood, particularly not with any implied understanding that they would be compensated by Youngblood for doing so.

The facts present a different picture with respect to Ashton. The plaintiffs had a valid contract with Ashton. While that agreement, by its terms, did not call for Ashton to compensate the Dessers as finders per se, the agreement certainly did contemplate that the Dessers would have the opportunity to benefit from any action by Ashton resulting from the Dessers' performance of their part of the agreement, to wit, furnishing Ashton with the information he wanted about Transign.

The Dessers did furnish this information which in turn led to Ashton being brought together with Youngblood. That contact eventually led to a deal for the purchase of Transign by Ashton, with others not including the Dessers, which was exactly the type of transaction to which the June 20 Agreement was addressed. Therefore, in this Court's view, the Dessers performed a service for Ashton in the nature of that usually performed by a finder, under circumstances which clearly implied

Ashton's acknowledgment that if the service led to a purchase of Transign, Ashton would allow the Dessers to reap a benefit from it. Ashton breached this agreement and profited as a result. Accordingly, the plaintiffs should recover from him for the value of their services. In this case, the Court determines that such a recovery should be a reasonable finder's fee.

In considering a reasonable finder's fee as the basis for measuring the value of the plaintiffs' services to Ashton and as a measure of the recovery to which they are entitled, the Court recognizes that an individual functioning as a broker is not necessarily entitled to earn a fee simply because he initially introduced two parties who eventually agreed upon a deal. See Sibbald v. The Bethlehem Iron Co., 83 N.Y. 378 (1881); Emil v. Hamburg Heaven, Inc., 16 App. Div. 2d 778, 228 N.Y.S.2d 353 (1st Dept. 1962). However, considering all the circumstances of this case, the Court finds that the ultimate purchase of Transign by Ashton and others was sufficiently closely related in time and in the nature of the transaction to what the Dessers were proposing when they enabled Ashton to get together with Youngblood so as to make a finder's fee a reasonable basis for plaintiff's recovery, whether for breach of the June 20 Agreement or in quantum meruit. See Simon v. Electrcspace

Corp., 28 N.Y.2d 136, 320 N.Y.S.3d 225, 269 N.E.2d 21 (1971); Seckendorff v. Halsey, Stuart & Co., 359 N.Y.353, 182 N.E. 14 (1932). The Court's conclusion in this regard is supported by the existence of the October 31, 1966 [sic] agreement between British-American and the plaintiffs, recognizing that a finder's fee would be fair compensation to the Dessers for their performance of the June 20 Agreement.

In sum the Court's conclusions with respect to this action are as follows:

1. The Court has jurisdiction over all of the claims and over all of the defendants.

2. The plaintiffs' first cause of action against all defendants based on the federal securities law is dismissed for failure of proof and all defendants shall have judgment with respect to that claim.[10/]

3. The plaintiffs shall have judgment on the issue of liability against the defendant Ashton on the plaintiffs' third cause of action based on pendent claims; the measure of the plaintiffs' recovery shall be a reasonable finder's fee.

4. The plaintiffs' fourth cause of action against the defendants Youngblood and Trans-Industries is dismissed for failure of proof and the defendants shall have

judgment with respect to that claim.

The foregoing shall constitute the Court's findings of fact and conclusions of law, with respect to the issue of liability, as required by Rule 52(a), Fed.R.Civ.P. The issue of the amount of damages having been reserved, the Court will set this matter down for a hearing on this issue, as defined and limited in this opinion, unless by July 12, 1976 the parties shall have advised the Court that they have agreed upon a settlement on the issue of damages.

SO ORDERED.

Dated: New York, New York
June 29, 1976

/s/

LAWRENCE W. PIERCE
U. S. D. J.

FOOTNOTES

1. The Court bifurcated the trial as to the issues of liability and damages.

2. The full text of the advertisement read:

"Tax Exempt Foundation
Will purchase private and closely held companies with pretax earnings of $200,000 and up. All negotiations conducted on a strictly confidential basis. Quick action assured. This is our first and only advertisement."

3. Tr. refers to pages of the trial transcript.

4. This conclusion led to the dismissal of the plaintiffs' federal claims at the end of the plaintiffs' evidence. See discussion infra.

5. In this regard, the Court credits Youngblood's testimony over the conflicting testimony of the Dessers.

6. The Court finds that this was the first time Youngblood was informed of the existence of the June 20 Agreement. Before this time it would have been contrary to the Dessers' interests to have told Youngblood of the Agreement since that would have been inconsistent with their presentation of Ashton to Youngbloid as a member of their organization. Likewise, when Ashton saw an opportunity opening up on the evening of July 27, 1966 to acquire Transign without the Dessers, it would have been foolish for him to have told Youngblood about his agreement with the Dessers and the Court credits his trial testimony that he did not. However, once Melvin Desser saw the possibility of losing the deal to Ashton, it was

FOOTNOTES (Cont.)

then entirely consistent with his interests to reveal to Youngblood the agreement about which he had said nothing up to that time, and the Court finds that he did.

7. Rule 41(b) does not require the Court, as the trier of the facts in a non-jury case, to draw any special inferences in favor of the plaintiffs in considering a motion to dismiss at the close of the plaintiffs' evidence. On such a motion the Court is to weigh the evidence, resolve any conflicts in it and decide on which side the preponderance lies. Wright & Miller, Federal Practice and Procedure: Civil § 2371.

8. Even if the Court's conclusion were different on the question of whether or not, at the June 20, 1966 meeting, the plaintiffs and Ashton entered into a contract for the purchase of Transign, the plaintiffs would still not prevail with respect to their federal claims. Faced with the issue, the Court would be unable to conclude that Ashton had entered into such an agreement with the fraudulent intent of breaching it. Where a Rule 10b-5 claim rests on a contract for the purchase or sale of securities such a fraudulent intent at the time of the formation of the contract is an essential element of the cause of action. See, e.g., Commerce Reporting Co. v. Puretec, Inc., 290 F.Supp. 715 (S.D.N.Y. 1968).

9. Here, the Court distinguishes between proof of the fact of damage and proof of the amount of damages. The latter issue was separated out for separate trial, if necessary. See note 1 supra.

10. Plaintiffs abandoned their second cause of action before trial.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed
MAR-8-1977

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LEONARD DESSER, MELVIN DESSER and JACOB S. LANDESMAN,

Plaintiffs,

- v -

ROY A. ASHTON, JAMES YOUNGBLOOD, and TRANS-INDUSTRIES, INC.,

Defendants.

----------x

69 Civ. 1767

APPEARANCES:

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Attorneys for Defendant Roy A. Ashton

LAWRENCE W. PIERCE, D.J.

MEMORANDUM AND ORDER

By order dated June 29, 1976, this Court found defendant Roy A. Ashton liable on the basis of plaintiffs' third cause of action and ruled that the proper measure of damages should be that of a reasonable finder's fee. At that time the Court dismissed the complaint in its entirety as

against defendants Youngblood and Trans-Industries, Inc. Thereafter the matter went to trial on the issue of damages only, and the parties rested on December 7, 1976. The following shall constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a) Fed.R.Civ.P.

The facts underlying the Court's previous decision need not be repeated. However, certain of the Court's prior findings are pertinent here, and they are as follows:

> "The plaintiffs had a valid contract with Ashton. While that agreement, by its terms, did not call for Ashton to compensate the Dessers as finders per se, the agreement certainly did contemplate that the Dessers would have the opportunity to benefit from any action by Ashton resulting from the Dessers' performance of their part of the agreement, to wit, furnishing Ashton with the information he wanted about Transign.
>
> "The Dessers did furnish this information which in turn led to Ashton being brought together with Youngblood. That contact eventually led to a deal for the purchase of Transign by Ashton, with others not including the Dessers, which was exactly the type of transaction to which the June 20, 1966 Agreement was addressed. Therefore, in this Court's view, the Dessers performed a service for Ashton in the nature of that usually performed by a finder, under circumstances which clearly implied Ashton's acknowledgement that if the service led to the purchase of Transign, Ashton would allow the Dessers to reap a benefit from it. Ashton breached this agreement and profited as a result. Accordingly, the plaintiffs should recover from him the value of their services. In this case, the Court determines that such a recovery should be a reasonable finder's fee.

* * * *

> "The Court's conclusion in this regard is supported by the existence of the [August] 31, 1966 agreement between British-American and the plaintiffs' recognizing that a finder's fee would be fair compensation to the Dessers for their performance of the June 20 Agreement." (Desser v. Ashton, 69 Civ. 1767 (S.D.N.Y. June 29, 1976), Opinion at 39-41)

While certain of the findings quoted above went beyond the issue of liability and into the area of damages, the Court, having heard all the evidence on damages, adopts those findings in full for the purpose of this decision. Thus, the only issue remaining is what constitutes a reasonable finder's fee under the circumstances.

The evidence at the trial on damages consisted almost entirely of the testimony of two expert witnesses. It is plaintiffs' contention that a reasonable finder's fee in this case is equal to $123,000. Plaintiffs' expert witness, Mr. Stanley Foster Reed, arrived at that figure upon application of the so-called "Lehman Formula", which formula apparently derives from the investment banking house of the same name. The Lehman Formula provides that a finder is compensated by a fee of 5% on the first one million dollars of the consideration for the transaction or acquisition in question, 4% on the second million, 3% on the third million, and so forth. Mr. Reed, the publisher of a journal entitled "Mergers and Acquisitions", has authored several articles in the field and was certified as an expert witness on the question of a reasonable finder's fee without opposition from defendant's counsel (Tr. 12-13).

In brief, Mr. Reed testified that the Lehman Formula is the accepted standard in computing a finder's fee, even where the finder has done no more than to introduce the parties to an acquisition (Tr. 37). Further, Mr. Reed stated that in his view, the June 20, 1966 Agreement (PX-1), constituted a typical document used by a finder to protect his right to a fee (Tr. 49). In his opinion, at the time of the September 28, 1967 closing of the Transign acquisition, the Dessers were accordingly due a fee in the amount of $123,000.

Defendant's expert witness took a far different view of the propriety of applying the Lehman Formula to the efforts of plaintiffs herein, and reached very different figures as a result. Defendant's expert, Mr. Carl Goldman, is an investment banker who has in the past attempted to apply the Lehman Formula to transactions on which he worked. Goldman stated that the Lehman Formula is a goal sought by an investment banker who not only brings the parties together, but who further advises the seller, structures the details of the transaction, deals with tax considerations, and generally acts as a middleman between purchaser and seller. According to Mr. Goldman, only if the middleman does each of these things, and only if he is successful in his own negotiation for his fee, can he expect to be compensated under the Lehman Formula.

Starting from this viewpoint, and applying his view that a person who merely introduces the parties can expect

to receive only between 10% and 25% of the investment banker's fee, Mr. Goldman reasoned that Ashton, and not plaintiffs, was the one due a Lehman Formula fee for putting together the final Transign acquisition. Thus, according to the witness, if Ashton is viewed as the investment banker, his fee would have been approximately $100,000, and the plaintiffs would have been entitled to between 10% and 25% of that figure, or between $10,000 and $25,000. Mr. Goldman further reduced the amount he thought the plaintiffs were due by reasoning that since Ashton himself acquired only one-third of Transign, Ashton owed plaintiffs only one-third of their finder's fee, or between $3,000 and $7,500 (Tr. at 53-54). Defendant's expert also testified that the result would be approximately the same even if Ashton was viewed solely as a principal in the transaction. Under such a view, Mr. Goldman reasoned that the value of a bare introduction was approximately $10,000, and that since Ashton was but one of three co-equal principals, his obligation to plaintiffs was only $3,000. Finally, in response to a question put by the Court, Mr. Goldman rejected the view that the Dessers were due $1000,000 in light of British-American's August 31, 1966 agreement to compensate the plaintiffs at that amount. Mr. Goldman again stated that Ashton was but a one-third owner of Transign under the later transaction, and that the later transaction was entirely different from the proposed British-American acquisition.

Discussion

Before considering the question of the amount of a reasonable finder's fee in this case, the Court must address defendant's argument that any finder's fee is here barred by the statute of frauds. See N.Y. Gen. Oblig. L. §5-701(10); Intercontinental Planning Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).. However, this argument must fall since here there are two writings which individually or taken together serve to satisfy the requirement of a writing. First, on June 20, 1966, defendant Ashton agreed that he would

> "not attempt to acquire the Company or deal with the Company in any manner either personally or in any of his corporate capacities, except on terms and conditions acceptable to you in your sole discretion." (PX-1)

Further, on August 31, 1966, Ashton, on behalf of his employer British-American, agreed with the plaintiffs that British-American "will pay to the Finders, a commission in the aggregate amount of $100,000, . . . which Finders acknowledge shall constitute payment in full to them. . . ." (PX-6).

In this Court's judgment, these documents are more than adequate to satisfy the requirement of a writing. As Judge Platt has written in a very similar case, such writings are sufficient.

> "These communications . . . sufficiently identify the seller; identify and establish plaintiff's role in the

> negotiations; establish the subject matter of the transaction; and most important, acknowledge performance by and obligation to the plaintiff as a consequence of his assistance in arranging the sale . . . . They are sufficient to support a claim for compensation under a theory of quantum meruit. And they dispel all fears of the type that courts have expressed in the past when applying §5-701." (Flammia v. Mite Corporation, 401 F.Supp. 1121, 1133 (E.D.N.Y. 1975))

Indeed, here the documents go even further than those presented in Flammia. The agreement between British-American and plaintiffs, entered into only two months after the June 20, 1966 agreement by Ashton, establishes not only that the plaintiffs shall be compensated as "Finders" but further sets a dollar value on their compensation. This document, when viewed together with PX-1, satisfies all the requirements of the statute, even though Ashton was not personally bound by the August 31, 1966 agreement.

> "Writing sufficient to satisy the Statute need not be contained in one document. Separate documents dealing with the same subject matter suffice if the connection of documents not signed by a party with those that are signed is demonstrated by internal reference or by subject matter. Transit Advertisers v. New York, New Haven & Hartford R. Co., 194 F.2d 907 (2d Cir.), cert. denied, 344 U.S. 817 (1952)." (Flammia, supra, at 1133 (citations omitted)).

The decision cited by the plaintiffs, as well as the evidence presented, establish that the "Lehman Formula" is indeed the customary formula applied to compensate a finder. See Havenfield Corporation v. H&R Block, Inc., 509 F.2d 1263,

1270 (8th Cir.), cert. denied, 421 U.S. 999 (1975); Flammia v. Mite Corporation, 73 Civ. 1571 (E.D.N.Y. July 14, 1976); Schaller v. Litton Industries, Inc., 307 F.Supp. 126 (E.D. Wisc. 1969). However, there is some support in the cases for defendant's proposition that a full Lehman Formula fee is appropriate only where the "finder" has also performed at least some of the functions of an investment banker, see Havenfield Corp., supra, or where the finder has rendered some special efforts or has some special expertise in the business or industry in question. See Flammia, supra. The Court also finds, on the basis of defendant's evidence, that the Lehman Formula is often subject to negotiation.

However, in light of its previous findings in this case, the Court rejects the view advanced by defendant's expert that Ashton owes to plaintiffs only one-third of whatever constitutes a reasonable finder's fee. In its prior decision, the Court found that Ashton, and not any of the other defendants, breached a duty owed to the plaintiffs. Since Ashton was the only person found to have breached that duty, he is the only one who must respond to plaintiffs in damages. It would be unjust and illogical to reduce plaintiffs' recovery by two-thirds solely because Ashton, in breaching the June 20 Agreement, happened to combine with two other persons to consummate his breach.

Thus, the Court concludes that Ashton is liable for a full finder's fee, but that such a fee is not in this case

necessarily determined by the Lehman Formula alone. The Dessers did introduce Ashton to Youngblood; they did travel to Detroit and seek to arrange the acquisition. Indeed, they played an integral part in the abortive British-American transaction. At that point it was recognized by Ashton, albeit acting for British-American, and by the Dessers that the efforts of the plaintiffs were worth approximately $100,000. They embodied that figure in an agreement (PX-6). Simply because that transaction was not consummated did not grant to Ashton the right to make use of the information he had obtained from the plaintiffs in violation of his personal agreement with them. Nor does the fact that the British-American deal failed negate altogether the participants' assessment at that time that the plaintiffs' efforts deserved to be compensated in the amount of $100,000.

It is true that Ashton, and not the Dessers, did much of the work that led to the successful sale of Transign in September 1967. However, that factor but militates against applying the full Lehman Formula in assessing Ashton's liability to the plaintiffs. The participants to the August 1966 agreement placed a dollar value on the efforts plaintiffs had performed up to that time. The Court finds it equitable and just to hold Ashton to that figure.

For the foregoing reasons, judgment should be entered for the plaintiffs against the defendant Roy A. Ashton

for damages in the amount of $100,000 plus interest at the prevailing statutory rate from September 28, 1967. Counsel for the plaintiffs is directed to submit an appropriate order of judgment on five days notice in accordance with the rulings of this Court in this decision and in the Opinion dated June 29, 1976.

SO ORDERED.

Dated: New York, New York
March 3, 1977

LAWRENCE W. PIERCE
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
APR 6 1977
S.D. OF N.Y.

LEONARD DESSER, MELVIN DESSER and JACOB S. LANDESMAN,

Plaintiffs,

-against-

ROY A. ASHTON, JAMES YOUNGBLOOD and TRANS-INDUSTRIES. INC.,

Defendants.

69 Civ. 1767 (L.W.P.)

JUDGMENT

This action came on for trial before the Court, the Honorable Lawrence W. Pierce, District Judge, presiding, and the issues having been duly tried and a decision having been rendered, it is

Ordered, Adjudged and Decreed that the first, second and fourth causes of action, contained in plaintiffs' third amended complaint be and they hereby are dismissed in their entirety on the merits, and it is further

Ordered, Adjudged and Decreed that plaintiffs Leonard Desser, Melvin Desser and Jacob S. Landesman recover of defendant Roy A. Ashton on the third cause of action contained in their third amended complaint, the sum of One Hundred Thousand Dollars ($100,000), with costs to be taxed, and it is further

Ordered, Adjudged and Decreed that plaintiffs Leonard Desser, Melvin Desser and Jacob S. Landesman recover of defendant Roy A. Ashton interest on the judgment at the prevailing statutory rate from September 28, 1967, as follows:

(a) from September 28, 1967 through June 30, 1968 at the rate of 6% per annum, in the amount of $4,500.00;

(b) from July 1, 1968 through February 15, 1969 at the rate of 7-1/4% per annum, in the amount of $4,500.00;

(c) from February 16, 1969 through September 1, 1972, at the rate of 7-1/2% per annum in the amount of $31,875.00;

(d) from September 1, 1972, at the rate of 7-1/2% per annum in the amount of $26,000.00;

making in all the total sum of $166,875.00, and it is further

Ordered, Adjudged and Decreed, that plaintiff's complaint against defendants James Youngblood and Trans-Industries, Inc., be dismissed in its entirety on the merits, without costs to any of said parties from each other, ~~and that such defendants shall recover of plaintiffs the costs of this action,~~ and it is further

Ordered, Adjudged and Decreed that execution of the judgment against defendant Ashton be and it hereby is stayed for a period of thirty (30) days from the date hereof, and, if defendant Ashton takes and prosecutes an appeal from this judgment to the United States Court of Appeals for the Second Circuit, ~~such~~ said stay shall continue until the hearing and determination of such appeal.

Dated: New York, New York
March 31, 1977

Motsen
U.S.D.J.

JUDGMENT ENTERED - 4/6/77
Raymond F. Burghardt
CLERK

COPY RECEIVED
SHEA GOULD CLIMENKO & KRAMER

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